JOINT APPENDIX TO BRIEFS

IN THE

Supreme Court of the United States

October Term, 1967

No. 247

THE PUYALLUP TRIBE, a Federal Organization,
Petitioner,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF WASHINGTON

PETITION FOR CERTIORARI FILED JUNE 12, 1967
CERTIORARI GRANTED DECEMBER 18, 1967

METROPOLITAN PRESS SEATTLE, WASH.

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RESPONDENTS' DESIGNATION OF EVIDENCE

PETITIONERS' DESIGNATION OF EVIDENCE

EXPLANATION OF RECORD

Arrangements were made through stipulation of the parties and the cooperation of the Clerk of Washington State Supreme Court and by order of the Washington State Supreme Court to forward the entire original record to the United States Supreme Court.

The record from the Washington Superior Court to the Washington State Supreme Court was three designations. First, a verbatim statement of the entire proceedings in the trial court was prepared and this was referred to as 'Statement' and in this Appendix will be referred to as R. St. (Record Statement). Secondly, the Clerk in the trial court prepared and certified for the Washington State Supreme Court relevant pleadings by the parties, orders, judgment, and findings of the trial court. These certified documents were forwarded to the Washington State Supreme Court and entitled 'Transcript'. For purposes of this Appendix, reference to this Transcript will be abbreviated R.T. (Record Transcript). Thirdly, the exhibits at trial court were designated as P. Ex. being the abbreviation for the plaintiffs' exhibit who are the respondent in this proceeding and D. Ex. which is the abbreviation for defendants' exhibits who are the petitioners in this proceeding. For purposes of this Appendix, the abbreviations will be R.P. Ex. (Record exhibit by plaintiff) and R.D. Ex. (Record exhibit by defendant).

I.

RELEVANT DOCKET ENTRIES

CIVIL DOCKET

Pierce County Superior Court (trial court)

Title of Case:

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON
AND THE
DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Plaintiffs,

v.

THE PUYALLUP TRIBE, *et al*,[1]
Defendants.

Attorney for Plaintiff (Respondents herein):
JOSEPH L. CONIFF

Attorney for Defendant (Petitioners herein):
ARTHUR KNODEL
5505 20th Street East
Tacoma, Washington 98424

DATE	PROCEEDINGS	APPENDIX PAGE NOS.
1963		
Nov. 12	Complaint filed.	5
Nov. 12	Temporary restraining order entered by Superior Court (trial court) restraining the Puyallup Indians from fishing within the exterior boundaries of the Puyallup Indian Reservation and at their usual and accustomed grounds and stations	7

1. The plaintiff improperly designated the Puyallup Indian Tribe as a corporation. The Puyallup Tribe of the Puyallup Reservation has never been incorporated, did not incorporate under the second branch of the Wheeler-Howard Act (25 USCA 477) and did not adopt a charter thereunder to be sued in any court of competent jurisdiction.

2. Numerous other motions were made prior to trial during trial and after trial to dissolve the restraining order and challenging the jurisdiction of the Court and order entered denying the same.

DATE	PROCEEDINGS	APPENDIX PAGE NOS.
1967		
Jan. 12	The Washington Supreme Court rendered its opinion.	39
Mar. 15	Remittitur issued by the Washington State Supreme Court which made the judgement of the Washington Supreme Court final as of March 13, 1967.	68
June 2	The Pierce County Superior Court (trial court) in its ministerial function entered the final order (Amended injunction) pursuant to the direction of the Washington Supreme Court wherein the Puyallup Tribe was permanently enjoined from drift net or set net fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of of the State of Washington (the area referred to by said order includes that area within the exterior boundaries of the Puyallup Indian Reservation and at the usual and accustomed fishing station under the Medicine Creek Treaty).	69
June 12	Petition for Writ of Certiorari filed with the United States Supreme Court.	
Dec. 18	The United States Supreme Court granted the Writ of Certiorari.	

COMPLAINT (R. T. 1)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON AND THE DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON,
Plaintiffs,

v.

THE PUYALLUP TRIBE, INC., a corporation, JEROME MATHESON, Chairman; FRANK WROLSON, Vice-Chairman; ALICE BUBER, Secretary-Treasurer; SILAS CROSS; FRANK WRIGHT; ROBERT SATIACUM; CHESTER SATIACUM; CHARLES SATIACUM; FLOYD BUFER; JOE JOSEPH; JOHN JOSEPH; WALTER KOHEN; ALEX LANDRY; FRANK LOZIER; ANDREW MOSES; JACK MOSES; LEVI SONCHEZ, JR.; ALEXANDER THOMAS; MARVIN THOMAS; NORBERT THOMAS, JR.; ROBERT THOMAS; WARREN HARDING BLINER; HENRY CROSS; ELIZABETH DANIELS; HERMAN DILLIN; JANA DILLIN; KAY DILLIN; RICHARD GEORGE; DON GEORGE; WAYNE M. IVES; DOMINICK F. IVES; TOM JAMES; HARRY JOHNS; CHARLES MATHESON; JOSEPH J. MATHESON; JOHN TURNIPSEED; RUBIN WRIGHT; ELAINE WRIGHT; JOHN YOUNG; and JOHN DOE and JANE DOE, members,
Defendants,

No. 158069
COMPLAINT

Come now the plaintiffs, by and through their Attorney General, John J. O'Connell, and Assistant Attorneys General, Joseph L. Coniff and Mike Johnston, and for a claim against the defendants, state as follows:

I.

The State of Washington is a sovereign state of the United States, and that the Departments of Fisheries and Game thereof are charged with the duty of enforcing its laws, rules and regulations relating to the preservation,

conservation, and management of the food and game fishery resources of the state.

II.

The defendants are citizens of the State of Washington and of the United States of America.

III.

The Puyallup River is a river which flows through Pierce County in the State of Washington which sustains a large anadromous fish population.

IV.

The plaintiffs have expended a substantial amount of public monies to maintain the anadromous fish runs of the Puyallup River.

V.

The defendants claim special privileges or immunities from the application of valid conservation laws of the State of Washington, to which they are not legally entitled. By virtue of the claimed special privileges or immunities, the defendants are fishing extensively in the Puyallup River and Commencement Bay with set nets and drift nets.

VI.

As a result of the defendants' fishery, the anadromous fish runs of the Puyallup River will be virtually exterminated if said fishery is permitted to continue.

The plaintiffs have no adequate remedy at law and the public will suffer permanent irreparable injury from the acts of the defendants.

WHEREFORE plaintiffs pray that the court declare that the defendants are not entitled to any privileges or immunities from the application of state conservation measures;

FURTHER, the plaintiffs pray that a temporary restraining order be issued enjoining the defendants from netting anadromous fish in Commencement Bay, the Puyallup River or any of its tributaries and directing the defendants not to hamper or molest in any way the anadromous fish runs of the Puyallup River;

FURTHER, that the court fix a time certain at which time the defendants shall show cause why they should not be enjoined and restrained during the pendency of this action from netting the runs of anadromous fish of the Puyallup River; and

FURTHER, that plaintiffs have judgment against the defendants permanently enjoining them from destroying the runs of anadromous fish of the Puyallup River system, and for such other relief as the court may deem just and reasonable.

JOHN J. O'CONNELL
Attorney General
s/ JOSEPH L. CONIFF
MIKE JOHNSTON
Assistant Attorneys General

Office and Post Office Address:
115 General Administration Bldg.
Olympia, Washington

TEMPORARY RESTRAINING ORDER ENTERED BY SUPERIOR COURT (TRIAL COURT)

(R: T. 2)

It appearing to the satisfaction of the court from the verified complaint of the plaintiffs that this is a proper case for a temporary restraining order and that unless the temporary restraining order prayed for in said complaint be granted, great injury will result to the plaintiffs before the matter can be heard on notice;

NOW, THEREFORE, IT IS HEREBY ORDERED that said defendants, and each of them, appear before this court in the department of the presiding judge at the hour of 10:00 A.M. on November 26, 1963, then and there to show cause, if any they have, why they and each of them should not be restrained and enjoined during the pendency of this action from netting food fish and game fish from the Puyallup River in accordance with the prayer of this complaint.

AND IT IS FURTHER ORDERED that, pending the hearing of this order to show cause, you and each of you

said defendants are hereby restrained and enjoined from netting food fish or game fish from the Puyallup River.

IT IS FURTHER ORDERED that a copy of the complaint herein, together with the summons, and of this order be served on each of the defendants herein.

Done in open court this 12 day of November, 1963.

Judge of the Superior Court

RETURN ON TEMPORARY RESTRAINING ORDER AND ANSWER TO COMPLAINT

(R. T. 3)

COMES NOW, the PUYALLUP TRIBE of INDIANS, by and through the Chairman of the Tribal Council, MR. JEROME MATHESON, and for their Answer to the Temporary Restraining Order and Order to Show Cause of the State of Washington makes their reply and return as follows, to-wit:

I.

Answering Paragraph No. 1 these defendants being a tribe of Indians signators to the Treaty of Medicine Creek deny that this is a proper case for a restraining order and deny that any great injury will result to the State of Washington. That this Tribe of Indians signed a treaty with the United States of America as a sovereign nation of Indians and under the articles of the said treaty they have exclusive right to the uses of the fish in the Puyallup River and that they are the owners of the fish in the said river and that if flows through the land which they reserved to themselves since time immemorial and that the State of Washington does not own the fish in the river and therefore couldn't possibly be injured by the Puyallup Tribe or its members taking fish from the said river.

II.

Answering Paragraph II the defendants admit the same and allege that there are many members of the Tribe who gain their livelihood through fishing in the Puyallup River and that this is a valuable property right which belongs to the Tribe and is exercised by the Tribe members under the Treaty of Medicine Creek and that this Court

should immediately dissolve the restraining order and order to show cause heretofore entered herein and award damages to defendants for their invasion of their treaty rights and their civil rights.

ANSWERING PLAINTIFF'S COMPLAINT

I.

Answering Paragraph No. I of the plaintiff's Complaint the defendant denies the same and alleged that the State of Washington has no jurisdiction or authority to interfere in any manner whatsoever with the fishing rights on the Puyallup River or its watershed.

II.

Answering Paragraph II defendant admits the same.

III.

Answering Paragraph No. III admits the same and alleges that the fish in the said river belong to the Puyallup Tribe of Indians and that the State of Washington has no authority and no jurisdiction to interfere with the fishing rights of the said Puyallup Tribe of Indians in any manner whatsoever.

IV.

Answering Paragraph IV denies the same and alleges that if plaintiff has expended sums on the Puyallup River they do so subject to the rights of the defendant, Puyallup Tribe of Indians and its members.

V.

Answering Paragraph No. V, the defendants deny the same and allege that the state of Washington and the plaintiffs in particular have conspired to unlawfully abridge, destroy and thwart the rights of the defendant, Puyallup Tribe of Indians and its members to fish under the Treaty of Medicine Creek and that the defendants have suffered numerous arrests, jailing and other indignities at the hands of the plaintiffs who knowingly and wilfully badger, abuse and degrade the defendants under color of state law which right, privilege and immunities are secured by the Constitution and laws of the United States and the Treaty of Medicine Creek.

VI.

Answering Paragraph VI defendants deny the same and allege that the plaingiffs do not own the fishery which is extant in the Puyallup River and they have falsely claimed that the fish runs are declining when in truth and in fact the fish runs are increasing. That the plaintiffs are recklessly using the power of the State of Washington to deprive the defendant and each of them of their means of making a livelihood which is secured to them by the Treaty of Medicine Creek and the Constitution of the United States of America. That the plaintiffs by their own statements and their own statistics they do not have figures to substantiate any marked decline in fish runs on the Puyallup River by the Indians. In truth and in fact the plaintiff cannot substantiate by facts and figures any of the conclusions to which they subscribe concerning any detrimental effect of the Indian fishery on the Puyallup River.

That the plaintiffs have knowingly and willfully undertaken to deliberately harass, annoy and abuse defendants for political reasons although in previous actions the Supreme Court has ruled against them consistently and in truth and in fact they have no jurisdiction to interfere with the rights of the Indians. That the Puyallup Tribe of Indians own the fish in the river so that the plaintiffs couldn't possibly be hurt in any manner whatsoever by the fishing of the Puyallup Tribe of Indians in the Puyallup River.

WHEREFORE defendants pray that the restraining order be dismissed; that the show cause order and complaint be dismissed; and that the defendants be given their costs and disbursements herein incurred and damages caused by this unlawful interference with their fishing and civil rights.

TRIAL COURT'S MEMORANDUM DECISION

(R.T. 20)

(Caption omitted.)

John D. Cochrane, filed May 27, 1967

A few days before Christmas in 1854, Governor Stevens, representing the United States, met with representatives of the Nisqually and Puyallup Indian tribes, on the banks of Medicine Creek, and negotiated a treaty concerning land and hunting and fishing rights. The treaty was reduced to writing and signed by the authorities of the Government. It was also signed by the Indians representing their tribes, but since they could neither read nor write, their signatures were merely indicated by their mark (Ex. "A"). This treaty was ratified by President Pierce in 1855. At this time there were only a few white settlers, and the Puyallup Indians consisted of various groups with villages along the river and on the shores of Commencement Bay. Any ownership of land the Indians may have had was communal in nature.

At that time the river flowed peacefully into Commencement Bay; there were no dams on the river, no factories, no lumber mills, no commercial and industrial developments, no municipal sewage—nothing such as exists today.

The Puyallup Indians who inhabited the lower reaches of the river and the area around Commencement Bay depended for their subsistence, to a large degree, on the fish they caught in these waters and the shellfish they found on the shores.

Article 3 of the Medicine Creek Treaty provides as follows:

> "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,*

> That they shall not take shellfish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding-horses, and shall keep up and confine the latter."

Now, over a hundred years later, we are concerned with the rights of the defendants under this Article of the treaty.

Since the beginning of this action, the defendants have sought to have the same dismissed, on the grounds that this court does not have jurisdiction. This motion to dismiss has heretofore been denied, and the court adheres to the previous rulings herein on that point without further comment.

Three primary questions are presented to this court for determination. They are:

1. Is there a Puyallup tribe which succeeds in interest to the rights of the signers of the Treaty of Medicine Creek?

2. Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?

3. Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

It may be that the answer to any one of these questions would obviate the necessity of answering the others; however, in view of the facts and law involved, and the interest of the parties in the answers to all three questions, the court proposes to answer each one.

In answering these questions, it is necessary to look at the facts and the law as they exist today, and not as they existed over 100 years ago or even 50 years ago, as many changes have occurred in the intervening years.

QUESTION No. 1:

According to the testimony of Dr. Herbert C. Taylor, Jr., an anthropologist and Dean of Western Washington College, in 1790 there were about 800 to 1000 Puyallup Indians; in 1839 there were 484, in 1844, 207, and by 1854, at the time of the signing of the treaty, there were about 100.

Dr. Taylor says the lower Puyallup Indians were assimilated into the white development of the area and were destroyed as a cultural identity.

He defines a tribe as "A group of a simple kind, in a definite locality, speaking a common language, with a single government." The Puyallups in 1854 were a tribe, but are not now by this definition. They can only be identified now by inheritance.

Dr. Colin E. Twedell, also an anthropologist, was able to trace many of the individuals listed in the 1929 roll of Puyallup Indians by at least some degree of blood, back to the original signatories of the treaty. Dr. Taylor says that the Puyallup Indian culture is dead—that the only thing that survives are memories. They are now Americans by "cultural assimilation;" what was two cultures has become blended into one.

Defendants contend there is a present, existing Puyallup tribe evidenced by their tribal roll of 1929 (Ex. "H") and that it has been recognized by the Federal government, and only Congress can terminate their tribal existence. There are 344 members according to the 1929 roll.

Recognition for one purpose does not mean, however, that there is recognition for all purposes. The fact that the government would take cognizance of a tribal roll for distribution of funds does not mean recognition as successors to the rights of signatories to the treaty. The testimony at the trial indicated that the roll was prepared to cover the distribution of funds, and that blood quantum was not a necessary prerequisite for inclusion in the roll.

Is the present Puyallup tribe any different than say the Italian-American Club, the Order of Ahepa, or Sons & Daughters of Norway? The fact that some blood relationship may be required by one organization and not by another, doesn't alter the fact that the purpose may be merely social, fraternal, et cetera.

It is urged that the tribe is more than this because they have a communal right granted by the treaty which carries on down to the present time.

The evidence indicates, however, that most of the matters considered at meetings of the tribe, or tribal council,

deal with enrollment, operation of the cemetery, and the disposition of trust funds.

The only Indians who appear to assert their rights to fish, are the individual defendants other than the tribe itself. In an effort to establish the ownership of a fishing right, some of the Indians paid to the tribe a fee of $25.00 for the right to fish for a year, but there was no effort to enforce the licensing fee, and its collection was dropped. It thus appears that except as they are actively defending this suit, the tribe has not in fact at any time before asserted its communal ownership of fishing rights.

The defendants in this case are no longer wards of the government. They are citizens of the United States, and over the years have blended their status with all other citizens to the extent that they no longer retain any exclusive rights that were granted by the treaty. To say that they have any superior rights to others would make them super citizens, enjoying rights and privileges not given to others in the community.

At the time of signing the treaty, it would probably be safe to say that they were savages. Savage, as defined in Webster's 3rd International Dictionary, is "a person living in a primitive state or belonging to a primitive society."

Would anyone assert that they are savages now? Certainly not, and they would be justifiably insulted if anyone would do so.

They are citizens of our county and state, with all the rights, privileges and responsibilities of any other citizen, no more—no less.

What have our courts said about continued recognition of a tribe? The case of *United States v. Sandoval*, 58 L.Ed. 107, a 1913 case, has been relied upon by both sides in discussing this question. The case arose out of a criminal prosecution for the sale of intoxicating liquor to the Pueblo Indians in the state of New Mexico.

The court pointed out that the lands belonging to the several Pueblos vary in quantity, but usually embrace about 17,000 acres, held in communal, fee simple ownership.

This alone would distinguish the Puyallup Indians from the Pueblos.

Further identifying the Pueblos, the court said:

> ". . . . Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people."

In 1854, the Puyallups could probably be distinquished from the white settlers on each of these characteristics, but as to each of these characteristics in 1965, there is nothing to distinguish the Indians from any citizen of the country.

The court further pointed out that the Pueblos were simple and ignorant people, dependent upon the fostering care and protection of the government, and there was even a New Mexico statute which excluded them from the privilege of voting.

By contrast, the present Puyallups are not simple and ignorant, are not dependent upon the care and protection of the government, and have equal voting rights with all other citizens.

The court went on to say:

> "It is for Congress, not the courts to determine when the true interests of the Indian require his release from guardianship. It is only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress and not by the courts."

The Puyallups are not now wards of the government, are not distinctly Indians from the point of view of their status as citizens, and, therefore, this court can determine for itself how they should be recognized and dealt with.

The right of the courts to deal with Indians directly, considering their changed status was dealt with in three

early cases by Judge Hanford of the U.S. District Court for the Western District of Washington.

The first was that of *United States v. Kopp,* 100 Fed. 160, a 1901 case.

Judge Hanford there said:

> ". . . Since the decision of the circuit court of appeals in that case (*Ross v. Eells,* 56 Fed. 855) the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the act of 1893 above referred to. It is certain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes. The circuit court of appeals agreed with this court in holding that the sixth section of the act of February 8, 1887, confers the right of citizenship upon the Puyallup Indians to whom lands were patented under the treaty of 1854; and, so far as the opinion delivered by Mr. Justice McKenna indicates the mind of the court, there is no disagreement with this court as to the nature of the estate granted by the patents. I feel justified, therefore, in adhering to the conclusion reached in that case,—that each patent conveyed a title in fee simple, subject to forfeiture upon conditions subsequent, and with a restriction upon the right of alienation for a period to be determined by future legislative enactments."

The court said:

> "The Puyallup Indians holding lands under patents of the tenor above set forth are citizens of the United States having all the rights, privileges and immunities of other citizens, and they are not under guardianship of the United States government, nor under the charge of any Indian superintendent or agent."

United States v. Ashton, 170 Fed. 509 (1909), was an

action to quiet title to certain land, where the court held that although the tribe had not been dissolved by any formal proceeding, it was disintegrated by the enfranchisement of its members. This case will be referred to again under the question concerning the existence of the reservation and its boundaries.

In re Celestine, 114 Fed. 551 (1902), the court said.

> ". . . Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the Negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the Supreme Court, in an opinion written by Mr. Justice Bradley, has said:
>
> " 'When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must he some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected.' Civil Rights Cases, 109 U.S. 25, 3 Sup. Ct. 31, 27 L.Ed. 844."

It is urged that the treaty with the Indians was a treaty with a separate nation and that as such only Congress can make or change treaties—this despite the fact that the Indians individually and as a tribe, so far as that term is applicable, are within the territorial limits of the United States, and the Indians are now citizens of the United States as well.

Montoya v. United States, 45 L.Ed. 521 (1901), discusses Indians as nations in the following language:

> "The North American Indians do not, and never have, constituted 'nations' as that word is used by writers upon international law, although in a great number of treaties they are designated as 'nations' as well as tribes. Indeed, in negotiating with the Indians the terms 'nation,' 'tribe,' and 'band' are used almost interchangeably. The word 'nation' as ordi-

narily used pre-supposes or implies an independence of any other sovereign power more or less absolute, an organized government, recognized officials, a system of laws, definite boundaries, and the power to enter into negotiations with other nations. These characteristics the Indians have possessed only in a limited degree, and when used in connection with the Indians, especially in their original state, we must apply to the word 'nation' a definition which indicates little more than a large tribe or a group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word. As they had no established laws, no recognized method of choosing their sovereigns by inheritance or election, no officers with defined powers, their governments in their original state were nothing more than a temporary submission to an intellectual or physical superior, who in some cases ruled with absolute authority, and, in others, was recognized only so long as he was able to dominate the tribe by the qualities which originally enabled him to secure their leadership. In short, the word 'nation' as applied to the uncivilized Indians is so much of a misnomer as to be little more than a compliment."

The Puyallup tribe clearly does not qualify as a "nation" as pointed out by the court in that case, and this argument about the tribe being a sovereign nation is without merit.

The case of *Oklahoma Tax Com. v. United States*, 87 L.Ed. 1612 (1943), involves the right of the state to impose inheritance taxes on the estate of deceased Indians.

The court held that although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal automomy. They are actually citizens of the state with little to distinguish them from all other citizens.

These Indians as well as the Puyallups, have a state that supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Indeed, if need be, they are eligible for welfare as well.

Having accepted the same benefits of other citizens, by becoming citizens and no longer being wards of the government, are they also entitled to retain benefits not afforded to other citizens? This court thinks not. By all the changes over the years, the tribe has lost its identity as a successor in interest to the treaty, and has accepted equal footing as citizens with no special privileges not available to all.

Our own court, in an early case, decided the status of individual Indians. *State v. Smokalem*, 37 Wash. 91 (1904). The case arose on the question of whether or not the state had jurisdiction in a criminal case over an Indian who committed a crime against the person of another Indian within an Indian reservation. In this case the court said:

> ". . . In 1883 or 1884 the lands on this reservation were allotted to the Indians in serveralty, except a small parcel, which is still retained by the government and used for school purposes. On March 3, 1903, all restrictions against the alienation of these allotted lands by the Indians were removed, and the allotted lands are now held by the Indians by th same tenure, and with the same right of alienation, as are the lands of all other citizens of the state. For at least five years prior to the commission of this offense, the Indians residing on this reservation maintained no tribal relations, had no chiefs or head men, maintained no form of Indian government, and had neither laws nor customs. They had abandoned their tribal relations, so far as lay within their power, and had assumed the habits and customs of the whites among whom they dwell. The reservation is divided into school districts and precincts; some, at least, of the Indian children attend the public schools maintained under the general laws of the state; precinct officers, such as justices of the peace and constables, are elected and perform the duties of their

offices, in their respective precincts. The Indians are qualified electors of the state, and all their differences are submitted to the courts of the state for adjudication and decision, having no courts of their own. There is no agency at the reservation, and the federal government assumes no jurisdiction whatever over the Indians, except in the simple matter of maintaining the school above referred to."

The case holds that an Indian who has severed his tribal relations and assumed the habits and customs of the whites, is no longer a member of the tribe.

At page 95, the court said:

". . . It is not to be supposed that Congress intended that the remnant of a band of Indians, like the Puyallups, without tribal relations, without laws or customs, and without government to administer them, should be left to prey upon each other and upon society at large, without restraint or fear of punishment from any source, unless they should commit one of the felonies enumerated in this act."

While this case dealt with the status of an individual only, nevertheless it and the other case law, together with the facts showing the change over the past 100 years, leads this court to the conclusion that there is no Puyallup tribe which succeeds in interest to the rights of the original signers of the Treaty of Medicine Creek.

We turn now to the second question: Is there an existing reservation of the Puyallup tribe, and if so, what are its boundaries?

At page 17 of the brief of the defendant *Satiacum,* it is asserted that the Puyallup Indian tribe owns the tidelands abutting on, or appurtenant to their original reservation established by treaty and executive order to "extreme low water." Indeed, it is probably necessary for the defendants to make this assertion, or otherwise they would be trespassing in their pursuit of their fishing activities.

But what about the owners of the lands along the shores of Commencement Bay, and the banks of the Puyallup River? Are the homes, factories, mills, warehouses,

parks, et cetera, et cetera, encroaching on the property of the Indians?

The reservation established for the Puyallup Indians covers an area from Pt. Defiance along Commencement Bay, up the Puyallup River for several miles, across it and then along the north side of it, and Commencement Bay to Brown's Point (Pl's Ex. 12; Def's Ex. "0").

Article 6 of the Treaty of Medicine Creek provides:

> "The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor."

In 1887, Congress passed the General Allotment Act (24 Stat. 388), authorizing the division of reservation land among individual Indians with a view towards eventual assimilation into our society.

In 1893, Congress passed the Puyallup Allotment Act (27 Stat. 633) which established a commission to allot the lands of the reservation to the Indians in severalty, and set up a ten-year trust period from the date of passage of the act (March 3, 1893) during which time the

allottees would not have the power to alienate their individual tracts.

Some question having been raised as to title when sales were made under this act, Congress in 1904 passed the so-called Cushman Act (33 Stat. 565). This act provides as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seven Statutes, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation 'for a period of ten years from the date of the passage' thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon their sale by said Puyallup Indians to their alloted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.
>
> "Approved, April 28, 1904."

The law seems to be clear, that a reservation cannot be changed or done away with, except by an Act of Congress. The question, therefore, seems to be whether or not the acts of Congress referred to, did, in fact, do away with the reservation when sales were made by Indian allottees.

Mr. Louis J. Burkey, an officer of, and attorney for the Tacoma Title Company, testified concerning a reservation and stated that reference is always made to the fact that certain land is within the Puyallup Indian Reservation and that he knew of no act which removed the existing boundary lines of the reservation. It appears to the court, that his testimony merely indicates that reference to the reservation is made simply as a geographical reference point.

He further testified that in conveyances covering lands within the original reservation boundaries, there are no restrictions or references to any fishing rights. In other

words, title is free from any claim of any Indian as to fishing rights, ownership of tidelands, access rights, or any other claim that could be asserted, based upon the Medicine Creek Treaty.

An early case of *United States v. Celestine*, 54 L.Ed. 195 (1909), is relied upon by defendants. This was a criminal case in which the crime was committed on the Tulalip Indian Reservation.

Although a patent had been issued, the tracts remained within the reservation. The court said:

> "When Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress."

However, the treaty with the Tulalip Indians provided for only a *conditional* alienation of the lands, making it clear that the special jurisdiction of the United States had not been taken away.

The defendants also rely on *United States v. Winans*, 49 L.Ed. 1089 (1905). In this case the Indians were given a right in the land—the right of crossing it to the river—the right to occupy it to the extent and for the purposes mentioned.

The case holds that the right secured to the Indians could not be extinguished by the United States or the state in granting patents to land, but says nothing of effect of allotments and sales by Indians.

An early case dealing directly with the question of whether the reservation had been abolished by allotment and sale is *United States v. Kopp*, 110 Fed. 160 (1901), referred to earlier in this opinion. In that case Judge Hanford dismissed a charge against Kopp for selling liquor to a Puyallup Indian. He held that the United States had not proved the vendor to be a Puyallup Indian. The judge said:

> "Since the decision of the Circuit Court of Appeals that case (*Eell v. Ross*, 64 Fed. 417), the conditions have been materially changed by actual sales of a considerable part of the reservation under the provisions of the Act of 1893 above referred to. It is cer-

tain that the purchasers from the commissioners appointed pursuant to that statute cannot be lawfully evicted from their property, and *I hold that by the subdivision and alienation of a considerable part of the patented land the reservation has been abolished, except the part retained as a site for an Indian training school, and use of the government for other purposes.*" (Emphasis supplied.)

The same judge in the case of *United States v. Ashton*, 170 Fed. 509 (1909), a quiet title action, said:

> "Every one of those patents extinguished all the rights of the tribe as a community with respect to the tract of land conveyed by it. The fishing rights secured to the Indians by the treaty, were by its express declaration a mere privilege to be enjoyed in common with all citizens and logically antagonistic to any claim of an exclusive or adverse right and entirely lacking in all of the essentials of a grant of an inheritable estate."

By this case, title to the tidelands was quieted in defendant as against any claims of the Indians.

A very recent case is that of *Klamath & Modoc Tribes v. Maison*, 338 F.2d 620 (1964), construing a Termination Act of Congress providing for the termination of Federal supervision over the trust and restricted property of the Klamath Tribe of Indians. The case is important as to the extent of termination of Indians' rights upon termination of a reservation. The court said:

> "We agree that the Termination Act has not expressly dealt with any treaty rights respecting hunting and trapping. It has, however most certainly reduced the area to which these rights attach. By treaty the rights of the Indians were limited to the lands of the reservation. By the Klamath Termination Act, *supra*, it was provided that to the extent necessary to meet the requirements of the Act, lands should be taken from Indian ownership and sold. *Such lands clearly were thereby severed from the reservation and thus released from any restrictions imposed upon them as reservation lands by the treaty.*" (Emphasis supplied.)

To the same effect is *State v. Sanapaw*, 21 Wis.2d 377, 124 N.W.2d 41 (1963). The intent of Congress as to the status of Indians is evidenced by House Concurrent Resolution 108, 83rd session, which states in part:

> "Whereas it is the policy of Congress as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and
>
> "Whereas, the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: . . ."

What is a reservation? It has been defined in the case of *United States v. McGowan*, 82 L.Ed. 410 as follows:

> "An Indian reservation consists of land validly set apart for the use of Indians, under the superintendence of the Government, which retains title to the lands."

In the case at bar, there is neither superintendence or retained title as to the alienated lands.

Our own court has considered this question in *State v. Satiacum*, 50 Wn.2d 513. In that case Judge Donworth said:

> "We are constrained to hold that alienation of the land which was, and is, within the original Puyallup reservation, and which borders upon the Puyallup River, does not alter the character of the right of the Indians to fish upon the river within the exterior boundaries of the original Puyallup Indian reservation, in view of the decision in the *Pioneer Packing Co.* case."

Defendants say that this is a *res judicata* of the question, and if this were so, this court would feel it was bound by this opinion. However, Judge Hill, in that case said that there is no majority opinion. He went on to say:

> ". . . nothing is decided except that the order dis-

missing the charges against the defendants is affirmed."

This court therefore takes the position that it is not bound by Judge Donworth's statement. It is the opinion of this court that the Puyallup Allotment Act of 1893 (27 Stat. 633) and the Cushman Act of 1904 (33 Stat. 565) in effect abolished the reservation and any fishing rights attached thereto as to any land sold subsequent to the allotment to individual Indians.

By these Acts, Congress evidenced, by the only means possible, its intent to abolish the Puyallup reservation through alienation. All the lands within the original boundaries of the reservation which have been sold are, therefore, no longer a part of the reservation, and all fishing rights claimed as being appurtenant to those lands have been abolished.

Turning now to the third question:

Are the regulations sought to be enforced by the state reasonably necessary for the conservation of fish?

At the outset, the court recognizes that there is a line of cases requiring the state to show that the regulations are "indispensable" in the conservation of fish, and this will be touched on later.

In this case we are dealing with salmon and steelhead fish which are known as anadromous fish. Anadromous fish may generally be defined as fish that are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn.

At the time of the Medicine Creek Treaty, in 1854, the Puyallup Indians were fish and shellfish eaters, and depended largely on them for their subsistence. This was their only need for the fish except for a minor amount of bartering. It is safe to say that present conditions were not contemplated when the treaty was negotiated and signed. As Judge Rosellini said in *State v. Satiacum, supra*:

"Inherent in the treaty is the implied provision that neither of the contracting parties would destroy

the very right and bounty which each ought to share."

While Indians apparently were fishing in the manner sought here to be enjoined, in the years following 1934, it was not until 1953 that any difficulty arose. This was due to the fact that much of the fishing was done at night, and it was not until about 1953 that a regulation required fish buyers to report their purchases as to locations and from whom purchased, thus bringing their commercial sales to the attention of the state.

Fishing was done at night prior to the introduction of monofilament nets which are practically invisible in the water and snare the fish by the gills as they swim into them on their way up the river. Nets used prior to the introduction of this material were visible to the fish and they tended to avoid them, thus making night fishing more effective.

Much evidence was introduced by fish and game protectors, and by fisheries experts of both Washington and Oregon concerning the manner of fishing practiced by the Indians and the need for regulation of fishing.

The waters of Commencement Bay and the Puyallup River are part of the Puyallup Preserve. No commercial fishing is allowed, and sport fishing is, by regulation, confined to hook and line. Evidence shows that the Indians use set nets near the mouth of the Puyallup in Commencement Bay and in the river itself. These nets are as long as over 100 feet and deep enough to practically touch bottom. They are fastened to fixed objects, such as pilings or bridge abutments, and are tended from time to time by being lifted out of the water, and the fish removed. Other nets used in the Puyallup River are drift nets that extend from one side of the river to the other, and are allowed to drift downstream, snaring fish in their webbing as they go. The fish caught are used personally, but a large number are sold commercially.

The complaint of the state is that this method of fishing is against state regulations and has the effect of depleting or ruining the salmon runs.

As has been pointed out, originally the Indians only

took enough fish for personal use and barter, which was inconsequential compared to the present demand for fish.

In order to maintain the run of fish, it is necessary to keep a proper balance of returning fish to the spawning grounds. Evidence indicated that there have been less and less returning fish from 1952 to 1964. The return went up sharply in 1964 because net fishing was curtailed at the mouth of the Puyallup River by a court injunction. The evidence indicates, however, that the Indian catch of salmon and steelhead is only about 3 to 5 per cent of the total.

It is argued by the defendants that commercial and sport fishing should be curtailed more, and that pollution in the streams, dams and dredging of the river, et cetera, cause the killing and depletion of fish runs, and not Indian fishing. The state argues, however, that all segments of the fishery must be regulated, and that pollution, dams, et cetera, are also regulated and taken into consideration in the over-all conservation program.

Fish swimming freely in the waters are now owned by anyone. Title is obtained when possession is obtained. We are here dealing, however, with a natural resource made available through the rivers and streams, and the right to regulate the fishing thus made available, and of thereby obtaining title to or ownership of the fish.

If the state has the right to regulate, the courts have adopted different rules as to what regulations may be adopted in order to preserve fish runs. *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (1951).

The defendants rely upon the case of *Maison v. Umatilla*, 314 F.2d 169 (1963), and contend that this court should adopt that rule. That case held that it is necessary for the state to show that the regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation. This court rejects this rule as being too strict, and imposes a burden on the state which is impossible to meet.

The case of *Tulee v. Washington*, 86 L.Ed. 1115 (1942), was one where Tulee was charged with fishing without a license. It was held that the state has power

to regulate the manner of fishing to conserve fish, but can't charge a license fee. This case is also authority for the proposition that the treaty did not give the Indians the right to fish unrestricted and free of any state regulation.

The conclusive case on this question so far as the state of Washington is concerned, is *State v. McCoy*, 63 Wn. 2d 421 (1963). Here, the defendant was fishing in much the same manner as were the defendants in the case at bar. At page 427, the court said:

> "One essential of a conservation program is the regulation of the harvest of salmon in salt and fresh water areas. It is regulation that provides the escapement necessary to maintain a perpetual supply of salmon for the harvest by all people. If a fishery, within a river or off its mouth, harvests too many of the adult salmon because of the shallow confined nature of the fishing area and the habits of the salmon which cause them to school up and delay in these areas prior to ascending the river, there will be little escapement to perpetuate the runs. An uncontrolled fishery in such areas may harvest almost the entire run of a fishery resource. Salmon are not inexhaustible and without their proper escapement for reproduction from year to year through controls in the harvest, the stocks will be reduced to a point where only a remnant run will exist."

This language applies with equal force to the situation sought to be regulated in the case at bar. The case holds that the state has the power and the right to subject Indians to reasonable and necessary regulations for the protection of the fishing resource.

Without reviewing the evidence in this case, it is clear to the court that a large number of fish must survive back to spawning grounds regardless of pollution, predators, logging, dams, et cetera, and Indian net fishing prevents such survival. It is necessary to prohibit all non-sport fishing in Commencement Bay and the Puyallup River in order to conserve the fish. While there no doubt is pollution and other man-made activities on the river that do adversely affect the fish, these in themselves

are not lethal, and any regulations covering any phase of fish protection are in vain unless the state also controls fishing in Commencement Bay and the Puyallup River.

Indians' unregulated gill net fishery in the Puyallup River has caused serious damage to the fish runs indigenous to that stream, and will, if permitted to continue, cause irreparable harm in that the fishery resource will be unable to sustain itself, in accordance with the basic principles of conservation. It follows that the regulations sought to be imposed by the state prohibiting net fishing in Commencement Bay and the Puyallup River are reasonably necessary for the preservation of salmon and steelhead fish.

From the answers to the questions in this case, the court concludes that the defendants are not entitled to any privileges or immunities from the application of state conservation measures, and that a permanent injunction may issue enjoining the defendants from netting anadromous fish in Commencement Bay, the Puyallup River, or any of its tributaries.

DATED at Tacoma, Washington, this 27th day of May, 1965.

JOHN D. COCHRAN, *Judge*

FINDINGS OF FACT AND CONCLUSIONS OF LAW (R.T. 4)

The matter coming on regular for trial this 1st day of February, 1965, the plaintiffs being represented by JOHN J. O'CONNELL, Attorney General and JOSEPH L. CONIFF and MIKE JOHNSTON, Assistant Attorneys General and the Puyallup Indian Tribe being represented by Attorney ARTHUR R. KNODEL and the defendant, ROBERT SATIACUM being represented by FREDERICK A. CONE and MALCOLM McLEOD and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises, hereby makes the following

FINDINGS OF FACT

I.

This action was commenced by the Department of Fisheries and the Department of Game of the State of Washington. The complaint alleged that the defendants were net fishing in the Puyallup River watershed and Commencement Bay in Pierce County, Washington. It was further alleged that the defendants were not entitled to any special privileges or immunities from any valid state conservation law, rules, and regulations and if the defendants' net fishery were permitted to continue it would cause irreparable damage to the anadromous fishery resource indigenous to the Puyallup River watershed and Commencement Bay. Plaintiffs alleged that they had no adequate remedy at law for defendants' actions.

Defendants answered and alleged that they were members of the Puyallup Tribe of Indians; denied that they were subject to the conservation laws, rules, and regulations of the plaintiffs; denied that their net fishery threatened the anadromous fish runs of Puyallup River watershed and Commencement Bay or that irreparable injury would result from their actions. As an affirmative defense, the defendants alleged that all of the acts that they had performed were done in their capacity as members of the Puyallup Tribe of Indians and that their ancestors negotiated a treaty with Territorial Governor Isaac I. Stevens (II Kappler 661) which treaty reserved to them "the right of taking fish at usual and accustomed grounds and stations" and that consequently they were not amenable to state conservation measures. The defendants further alleged that by virtue of the treaty, *supra*, and subsequent executive orders of the President of the United States that they possessed the exclusive right to fish free from any state regulation, within the exterior boundaries of the Puyallup Indian Reservation. The defendant, Robert Satiacum, by cross-complaint, sought several million dollars in damages against the State of Washington for interfering with his asserted right to fish. The defendant, Robert Satiacum, took a voluntary non-suit at the close of the trial.

Plaintiffs denied that defendants were successors in

interest to the Puyallup Tribe which was signatory to the Treaty of Medicine Creek and therefore defendants would not possess treaty fishing rights. Plaintiffs further denied that the Puyallup Indian Reservation presently exists. Plaintiffs further asserted that if defendants were possessed of any treaty fishing rights, those rights were subject to reasonable and necessary state conservation laws, rules and regulations and that the laws, rules and regulations sought to be enforced were both reasonable and necessary to preserve and conserve the anadromous fishery resources of the Puyallup River watershed and Commencement Bay.

II.

That in aboriginal times a band of Indians lived in the Puyallup River watershed. These Indians lived in several villages along the Puyallup River and had a primitive culture as did all Southern Puget Sound Indians in aboriginal times. They spoke a distinct dialect of Salishian language, the root language spoken by all Southern Puget Sound Indians.

III.

The Indians that lived along the Puyallup River in aboriginal times employed weirs, traps, nets, spears, and gaffs in their fishery and all such instrumentalities were far less refined and far less efficient than the modern equipment used by the defendants in fishing today which consists of modern nylon nets.

IV.

About 1790 approximately 800 to 1,000 Indians lived in the villages located in the Puyallup River watershed. In 1839 a Hudson's Bay Company census indicated that there were 484 Indians residing in the Puyallup River watershed. In 1844, a later census by the Hudson's Bay Company indicated that 207 Puyallup Indians resided in this area. In 1854, the year before the Treaty of Medicine Creek was signed, the Gibbs' census indicated that the Puyallup Indian population in this area had dwindled to 100. Of this number approximately 50 Puyallup Indians lived in villages located near Commencement Bay and 50 lived in the upper Puyallup River area.

V.

Around the year 1790 the horse was introduced to the upper Puyallup River area by the Sahaptin-speaking Indians who resided east of the Cascade Mountains. Trading began between the Sahaptin-speaking Indians and those who reside in the upper Puyallup River area. By the year 1830 the upper river Puyallups had become agriculturally oriented and utilized the horse in their economic life and as their principal method of travel, communication, and trade, in contrast to the lower river Puyallup Indians who relied on water transportation and had a subsistence economy consisting primarily of shellfish and fish.

VI.

During the period prior to the signing of the Treaty of Medicine Creek, and concurrent therewith, the lower river Puyallup way of life was being rapidly submerged into the dominant Western-European culture of the white settlers who were coming into this area in ever-increasing numbers.

VII.

The lower Puyallup were totally destroyed as a separate cultural entity shortly after the Indian wars of 1855-1856. The upper river Puyallup moved to the old Puyallup Indian Reservation established by executive order, pursuant to the terms of the Treaty of Medicine Creek. At the time of the removal of the upper river Puyallups to the reservation, no trace was left of the lower Puyallup Indians.

VIII.

The generally accepted anthropological definition of a "tribe," and the one which this court accepts, is: a group of a simple kind, in a defined locality, speaking a common language, with a single government. While the upper Puyallups met this definition as of the time that they moved to the old Puyallup Indian Reservation, they do not constitute a "tribe" today.

IX.

While certain of the individual defendants may be identified as blood line descendant members of the ab-

original Puyallup tribe, these individuals exhibit none of the primitive, savage, simple, and ignorant characteristics of members of the aboriginal Puyallup Indian tribe. The defendants do not speak the Puyallupi language but rather speak English. They, and their children, attend public schools, supported by the State of Washington. They depend, as all other citizens of the state for all of the governmental services made available by the state.

X.

While some of the defendants have participated in the affairs of a federally organized group known as the "Puyallup Tribe," this organization is in essence no different than the Italian-American Club or the Sons and Daughters of Norway, or like social groups. Over the years, the defendants have blended themselves into the dominant Western-European society to such an extent that they are indistinguishable from all other citizens of this state except for the fact that in some instances individuals may be able to trace their blood line ancestry to a member of the aboriginal tribe of Puyallup Indians. The activities of the defendants, insofar as they are related to the federal organization known as the "Puyallup Tribe," have been limited to considering problems with regard to membership, operation of a cemetery, the disposition of certain trust funds remaining on deposit for their benefit in the Treasury of the United States and the present assertion of their claimed immunities from state conservation measures.

The federal organization known as the "Puyallup Tribe" maintains no courts, has no policemen, and occupies no given land area. In fact, the lands over which the defendants assert exclusive jurisdiction now comprise an integral part of the City of Tacoma.

XI.

In 1929 the United States Government established a membership list of the then living descendants of the aboriginal tribe of Puyallup Indians. Blood line descendancy was not required to have an individual's name appear on the roll. The 1929 roll was prepared for the purpose of distributing certain funds resulting from the sale of the few remaining trust lands still held for the

benefit of the aboriginal Puyallup Tribe of Indians by the United States Government. This roll is now out of date, and although some efforts have been made to make it current, these efforts have not yet been successful. This court is unable to determine who is, or is not, a member of the federal organization known as the "Puyallup Tribe" at this time.

XII.

All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres.

XIII.

That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.

XIV.

The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.

XV.

The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.

XVI.

That the place, time, and manner of fishing by the defendants was and is in violation of the rules and

regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction or serious impairment of the anadromous fish runs of the Puyallup River.

XVII.

That once anadromous fish runs in a river system have been destroyed, it is generally impossible to reestablish them.

XVIII.

It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

FROM THESE FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

I.

There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.

II.

That the federal organization known as "the Puyallup Tribe of Indians" was not signatory to the Treaty of Medicine Creek and that any blood line descendants of the aboriginal Puyallup Tribe who also may be members of the present day federal organization have no rights by virtue of said treaty. That the guardian-ward relationship between the United States Government and the defendants was severed when the lands comprising the Puyallup Indian Reservation were authorized to be sold in 1903. That the Puyallup Indian Reservation no longer exists and that the state has assumed total and complete jurisdiction over all lands situated within its boundaries.

III.

That the anadromous fish conservation program of the State of Washington, as it affects the Puyallup River watershed and Commencement Bay, is an integral and

necessary part of an overall state conservation and preservation program for anadromous fish.

IV.

It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

V.

That to permit the defendants to fish as they have done since 1953, and as they would do in the future if not restrained, would seriously hamper and ultimately destroy the effectiveness of the state's conservation program, particularly as applied to the Puyallup River watershed and Commencement Bay.

VI.

That the defendants and all members of the federal organization known as the "Puyallup Tribe" should be permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the conservation laws, rules and regulations of the State of Washington.

Done in open court this thirteenth day of August, 1965.

s/JOHN D. COCHRAN
Judge

JUDGMENT AND DECREE OF TRIAL COURT ENJOINING DEFENDANTS

(R.T. 25)

The above-entitled matter having come on regularly for trial before the undersigned judge, sitting without a jury on the first day of February, 1965, the plaintiffs being represented by John J. O'Connell, Attorney General, and Joseph L. Coniff, and Mike Johnston, Assistant Attorneys General, and the defendants being represented by Melvin M. Belli, Frederick A. Cone, Arthur Knodel, and Malcolm McLeod, and the court having heard the evidence and the arguments of counsel being fully advised in the premises, and the court having entered its

Findings of Fact and Conclusions of Law now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED That plaintiffs shall recover their costs and disbursements incurred herein.

DONE IN OPEN COURT this 13th day of Aug., 1965.

s/JOHN D. COCHRAN
Judge of the Superior Court

NOTICE OF APPEAL TO STATE SUPREME COURT

To the Clerk of the above-entitled Court, to plaintiff and to John J. O'Connell, Attorney General, Larry Coniff and Mike Johnson, Assistant Attorneys General, plaintiffs' attorneys.

Take notice that the defendants in the above entitled action hereby appeal to the Supreme Court of the State of Washington from the judgment rendered and entered in said action on the 13th day of August, 1965, in favor of the plaintiff and against defendant and from the whole of said judgment.

DATED this 7th day of September, 1965.

MAJORITY AND DISSENTING OPINIONS OF THE SUPREME COURT OF WASHINGTON AND JUDGMENT

Appeal from a judgment of the Superior Court for Pierce County, No. 158069, John D. Cochran, J., entered August 13, 1965. *Reversed in part.*

Action for a declaratory judgment. Defendants appeal from a judgment in favor of the plaintiffs.

HILL, J.—The Department of Game of the State of Washington and the Department of Fisheries of the State of Washington, hereinafter called the Departments, brought this declaratory judgment action[1] for the purpose of determining whether certain named individuals had, as members of the Puyallup Indian Tribe, any privileges or immunities from the application of state conservation measures.

The defendants asserted rights under Article 3 of the Treaty of Medicine Creek (10 Stat. 1132) between the United States and various Indian tribes including the Puyallups. This treaty was signed December 26, 1854; ratified by the United States Senate March 3, 1855, and proclaimed by the President of the United States April 10, 1855. This treaty was the first of a group of 11 treaties negotiated with the Indian Tribes of the Pacific Northwest between December 26, 1854 and July 16, 1855.

By the treaty, the Puyallup Indians ceded, relinquished and conveyed to the United States "all their right, title, and interest in and to the lands and country occupied by them," in return for which they received a reservation and certain rights, including those named in article 3 which reads:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Ter-

1. The case caption is erroneous, there being no entity known as "The Puyallup Tribe, Inc., a corporation." The Puyallup Tribe of Indians did appear and answer by and through the chairman of the Tribal Council.

> ritory,[2] and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

The trial court concluded that the Puyallup Tribe no longer existed as an entity and that its members no longer had any rights under the treaty; that there was no longer any Puyallup Indian Reservation and, hence, that the Puyallup Indians had no fishing rights within what had been the reservation; and that

> It is reasonable and necessary that state conservation, rules and regulations be uniformly applied to all citizens on an equal basis. (Finding No. 4)

Consequently, the trial court permanently enjoined the defendants and all members of the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner contrary to the laws of the State of Washington, or contrary to the rules and regulations of the Departments.

From that judgment, the Puyallup Indian Tribal Council appeals.

It is first urged that the state Departments are not entitled to seek relief under the Uniform Declaratory Judgments Act (R.C.W. 7.24.010 *et seq.*). Basically, the contention is that the issues here before us for determination should be raised in individual criminal actions brought against Indians who violate the food fish and game fish conservation laws found in Titles 75 and 77 R.C.W., or the regulations promulgated thereunder.

(1) A multiplicity of arrests for violation of fishing regulations, which involve the jailing and detention for considerable periods of individuals and consequent

2. Each of the treaties with the Indians in Washington Territory preserved to the Indians the right to take fish exclusively in the reservations and at all usual and accustomed places (or, as in the treaty with which we are here concerned, "at all usual and accustomed grounds and stations"), in common with citizens of the Territory, or variably in common with citizens of the United States.

hardship to them and their families, seems to us the unnecessarily hard way of determining whether they have immunity from certain fishing regulations.

Since the Indians who claim immunity from these regulations claim them under the treaties between the United States and various Indian tribes, it seems to us that the state Departments acted wisely in seeking an interpretation of those treaties and a delineation of the rights of the members of the different tribes in a series of actions under the Uniform Declaratory Judgments Act.

On the merits, both parties assume an extreme and adamant position.

The Departments take the position that the Indians never had, as against the United States, any right to the "use and occupancy" of any land; that they were and are a conquered people, without right or title to anything. Having nothing to cede, there was no consideration for any promises made to them, and there is no necessity to respect those promises even though they were labeled "treaties."

(2) Our answer[3] is that regardless of whether treaties with Indian tribes were necessary, they were deemed desirable by the United States and those entered into by it cannot be repudiated by this state or its courts.

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3. A much more detailed and completely devastating answer is given by the Supreme Court of the United States in *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 55, 91 L.Ed. 29, 67 Sup. Ct. 167 (1946). Even the dissent in that case, while disagreeing with the view of the majority opinion as to Indian rights and title in the aboriginal lands "when there has been no prior recognition by the United States through treaty or statute of any title or legal or equitable right of the Indians in the land," does not suggest the abrogation of the treaties which have been ratified.

We commend, too, as an answer to the "hard-boiled" argument of the Departments, the article on "Original Indian Title" in "The Legal Conscience," a volume of the selected papers of Felix S. Cohen (pp. 273-303), in which he points out that the *Tillamooks* case, *supra*,

". . . gives the final coup de grace to what has been called the 'menagerie' theory of Indian title, the theory that Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined. . . ."

The case of *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 273, 99 L.Ed. 314, 317, 75 Sup. Ct. 313, 314 (1955), on which the Departments rely, points out specifically that there were no treaty rights involved and says:

> This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by force. . . .

Nor is there anything in *Village of Kake v. Egan*, 369 U.S. 60, 72, 7 L.Ed.2d 573, 581, 82 Sup. Ct. 562, 569 (1962), also relied upon by the Departments, which contains any suggestion that the United States is now [sic] about to allow a state to repudiate any treaty which the United States has made. The opinion does point out that,

> In 1871 the power to make treaties with Indian tribes was abolished, 16 Stat. 544, 566, 26 U.S.C. §71.

and that there were no treaties with Alaska Indians. It should also have pointed out that the same enactment provided that "no obligation of any treaty lawfully made and ratified" with an Indian tribe prior to March 3, 1871, was "invalidated or impaired." The opinion does not directly or by inference imply that the United States was just playing "Treaty" with the Indians when the Senate ratified and the President proclaimed the treaty here in question. It was not the Indians, but the United States and the white settlers in the Territory of Washington who were asking for this and other treaties in 1854 and 1855.

The Departments further urge that if the Puyallup Indians ever had any fishing rights as such, their rights in the reservation area long ago ceased to exist; that the members of the Puyallup Tribe are all citizens of the United States and the State of Washington and have no rights different from any other citizen.

The defendants, on the other hand, urge that they have rights under the Medicine Creek Treaty to fish on the reservation and at other "usual and accustomed grounds and stations" at any time and with any type of gear they choose and that they do not have to comply with any

regulation, or if they have to recognize any regulation it must be "indispensable" to the preservation of the fishery. (This last position is posited on *Maison v. Confederated Tribes of the Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963), which will be discussed later in this opinion.)

The observation of Mr. Justice Black in *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941), is still apropos:

> We think the state's construction of the treaty is too narrow and the appellant's too broad; . . .

The members of the tribes signatory to the various treaties do have certain special fishing rights thereunder, notwithstanding the contention of the state. And the members of such tribes are subject at least to regulations which are necessary for the preservation of the fishery, notwithstanding their contentions to the contrary.

We will now consider whether the trial court erred in reaching the conclusion:

> There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek (Conclusion of Law No. 1).

To support this conclusion, the trial court made Findings Nos. 10 and 11.

> While some of the defendants have participated in the affairs of a federally organized group known as the "Puyallup Tribe," this organization is in essence no different than the Italian-American Club of the Sons and Daughters of Norway, or like social groups. Over the years, the defendants have blended themselves into the dominant Western-European society to such an extent that they are indistinguishable from all other citizens of this state except for the fact that in some instances individuals may be able to trace their blood line ancestry to a member of the aboriginal tribe of Puyallup Indians. The activities of the defendants, insofar as they are related to the federal organization known as the "Puyallup Tribe," have been limited to considering problems with re-

gard to membership, operation of cemetery (*sic*), the disposition of certain trust funds remaining on deposit for their benefit in the Treasury of the United States and the present assertion of their claimed immunities from state conservation measures.

The federal organization known as the "Puyallup Tribe" maintains no courts, has no policemen, and occupies no given land area. In fact, the lands over which the defendants assert exclusive jurisdiction now comprise an integral part of the City of Tacoma (Finding No. 10).

In 1929 the United States Government established a membership list of the then living descendants of the aboriginal tribe of Puyallup Indians. Blood line descendancy was not required to have an individual's name appear on the roll. The 1929 roll was prepared for the purpose of distributing certain funds resulting from the sale of the few remaining trust lands still held for the benefit of the aboriginal Puyallup Tribe of Indians by the United States Government. This roll is now out of date, and although some efforts have been made to make it current, these efforts have not yet been successful. This court is unable to determine who is, or is not, a member of the federal organization known as the "Puyallup Tribe" at this time (Finding No. 11).

(3) We are satisfied that so long as the United States government, through its appropriate agencies, continues to recognize the existence of the Puyallup Tribe of Indians and its tribal roll, as they clearly do, the Superior Court for Pierce County acted without jurisdiction in making a judicial determination of the tribes's termination.

Historically and uniformally the termination of federal supervision of an Indian tribe has been accomplished by the Congress through enactment of legislation.[4] And

4. For examples of such legislation see: Termination of the Klamath Tribe, 25 U.S.C.A. § 564; Termination of Wyandotte Tribe of Oklahoma, 25 U.S.C.A. §§ 791-807; Termination of the Peoria Tribe of Oklahoma, 25 U.S.C.A. §§ 821-826; Termination of the Ottawa Tribe of Oklahoma, 25 U.S.C.A. §§ 841-853; Termination of Menominee Tribe of Wisconsin, 25 U.S.C.A. §§ 891-902; and Termination of the Ponca Tribe of Nebraska, 25 U.S.C.A. §§ 971-980.

even the Supreme Court of the United States defers to the executive and other political departments of government "whose more special duty it is to determine such affairs" stating that "If by them those Indians are recognized as a tribe, this court must do the same." (*United States v. Sandoval*, 231 U.S. 28, 47, 58 L.Ed. 107, 114, 34 Sup. Ct. 1, 6 (1913)).

The trial court's "Memorandum Decision" is a very able and scholarly document, and while we have disagreed on this phase of the case, we are persuaded by its presentation that the time is long past when there should be a supercitizenship on the part of those proudly claiming Puyallup-tribe ancestry which entitles them to disobey laws and regulations imposed for the conservation of a great natural resource, which all other citizens must obey. However, it is a supercitizenship conferred by treaty, and only the United States can remove the discrimination.

The trial court also found:

> All of the lands within the exterior boundaries of the old Puyallup Indian Reservation were sold, in fee simple absolute, pursuant to an act of Congress (33 Stat. 565) with the exception of two small tracts which are presently being utilized as a cemetery for members of the federal organization known as the "Puyallup Tribe." The total acreage remaining in trust status is approximately 22 acres. The original reservation was in excess of 18,000 acres. (Finding No. 12)

The evidence supports this finding, and it is clear that though the Puyallup Tribe continues to exist, the entire reservation, except for the small tract to which reference was made, has passed into fee simple private ownership, consequent to congressional action, and that there is no longer a reservation.

Some questions having arisen concerning the power of the Indian allottees to convey complete fee simple title to their allotted lands, Congress confirmed the removal of the trust restrictions against alienation of the allotted lands. 33 Stat. 565 (1904).

Be it enacted by the Senate and House of Repre-

sentatives of the United States of America in Congress assembled, That the Act of Congress approved March third, eighteen hundred and ninety-three (Twenty-seventh Statute, page six hundred and thirty-three), authorizing the sale of the Puyallup allotted lands, with restriction upon alienation "for a period of ten years from the date of the passage" thereof, shall be taken and construed as having expressed the consent of the United States to the removal of restriction upon alienation by said Puyallup Indians to their allotted lands from and after the expiration of said period shall be given effect of having been made without any restrictions upon the power of the allottee to alienate his land.

Conclusive evidence of congressional intent is shown by the House Committee's Report on this bill:

> This bill (H.R. 5767) is designed to give the consent of Congress to the removal of the restrictions heretofore placed on the sale of Puyallup allotted lands, and to permit said allottees to lease, encumber, grant, alien, sell and convey said lands as freely as any other person may sell and convey real estate. (H.R. Rep. No. 301, 58th Con., 2d Sess. (1904))

Attached to the report, as an exhibit, was a letter from the Commissioner of Indian Affairs expressing the view that,

> Should it become a law, it would certainly be clear to all concerned that the Government thereby gives its absolute, full, and complete consent to the removal of the restrictions mentioned.

There can be no question but that the legislation, as enacted, carried out the legislative intent.

Whether the land within the reservation remains in the possession of the original allottees, or whether it has passed into non-Indian hands, the result is the same, so far as the tribe is concerned: It has no legal interest in it. All of the land may be taxed by the state (except possibly the small tract reserved for cemetery purposes). *Goudy v. Meath,* 38 Wash. 126, 80 Pac. 295 (1905).

(4) While reservation lands are allotted and sold pursuant to an Act of Congress removing all restrictions upon alienation, there is no implied reservation of hunting and fishing rights. *United States ex rel. Marks v. Brooks,* 32 F.Supp. 422 (1940), citing *Pennock v. Commissioners,* 103 U.S. 44, 48, 26 L.Ed. 367 (1881), and *Spalding v. Chandler,* 160 U.S. 394, 407, 40 L.Ed. 469, 16 Sup. Ct. 360 (1896).

The fishing rights of members of the Puyallup Tribe rest not upon any rights in the reservation lands, because these have been surrendered pursuant to the congressional action to which we have referred, but upon their "right of taking fish, at all usual and accustomed grounds and stations, . . . in common with all citizens of the Territory," derived from the Medicine Creek Treaty. We are well aware of the statement in *United States v. Winans,* 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. 662 (1905), quoted in *Seufert Bros. Co. v. United States,* 249 U.S. 194, 198, 63 L.Ed. 555, 558, 39 Sup. Ct. 203 (1919):

> "We will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong, over those to whom they owe care and protection,' and counterpoise the inequality 'by the superiour justice which looks only to the substance of the right without regard to technical rules.' 119 U.S. I; 175 U.S. 1."

(5) We would protect these treaty rights as readily and effectively as they have been protected in *Winans, supra, Seufert Bros. Co., supra,* and *United States v. Brookfield Fisheries,* 24 F. Supp. 712 (D.C. Ore. 1938), but such rights are not absolute; they do not extend to the right to fish with such gear and at such times as would destroy the fishery. The United States Supreme Court, in *Tulee v. Washington, supra,* said:

> (T)he treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it fore-

> closes the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Consistent with this statement by the Supreme Court, this court and the Ninth Circuit Court of Appeals have passed on the regulations imposed by the Departments with an eye to determining whether the regulations concerning the manner and time of fishing then in question were necessary to the conservation of the fishery and, hence, could be enforced against Indians whose rights to fish at their usual and accustomed grounds and stations were preserved to them by treaties similar to the one before the court in the *Tulee* case.

McCauley v. Makah Indian Tribe, 128 F.2d 867, 870 (9th Cir. 1942), was tried in the district court before the decision in *Tulee* was handed down, but heard in the circuit court following that decision. The district court had entered a sweeping injunction against the enforcement of regulations interfering with the Makah Indians fishing in the Hoko River. The case was reversed with the closing comment.

> The case seems to have been tried by both parties on the theory that the Indians had either all fishing rights on the Hoko River or only those of non-Indian citizens. It well may be that the Tulee case has decided all that the parties are seeking to determine regarding the Makah treaty provision. However, in reversing it is with permission to the appellees to amend their complaint and present the issue of their right to such claimed allowable methods of fishing, specifically described, and not by such a general term as "other Indian fishing gear," as they may be advised.

In *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951), again the Makah Indians sought an injunction against enforcement of certain regulations, and the district court dismissed the action; the Makahs appealed. The circuit court—citing the *Tulee* case, *supra*, and *Seufert Bros. Co. v. United States*, *supra*, and *United States v. Winans*, *supra*—summarily disposed of the contention which is also made here by the Departments, that

the Indians had no rights against state interference which do not exist for other citizens. It quoted with approval *Tulee, supra,* concerning such restrictions of a purely regulatory nature relative to the time and manner of fishing outside the reservation as are necessary for the conservation of fish and then said:

> We are not here concerned, as we were in *McCauley v. Makah Indian tribe,* 9 Cir., 128 F.2d 867, with any particular form of regulation. We do not question the right to enact regulations which will permit fishing in the Hoko River to the extent that will give the Makahs their treaty right to fish there without depletion of the fall run of salmon. We hold no more than that the appellee has not sustained its burden of proof that the instant regulations preventing the Makahs from the taking of fish in the Hoko are "necessary for the conservation of fish" in the fall run of salmon in that river.
>
> The decision of the district court is reversed and that court ordered to make and enter an order restraining the appellee from enforcing such regulations.

In *State v. McCoy,* 63 Wn.2d 421, 387 P.2d 942 (1963), we upheld a 10-day closure of all fishing on the Skagit River, designed to protect the peak of the salmon run passing through that river to the spawning grounds,[5] on the basis that the regulation was necessary to conserve chinook salmon runs in the Skagit River. In that case, McCoy, a member of the Swinomish Tribe, was arrested for fishing near the mouth of the north fork of the Skagit River. He was operating an 18-foot, 25-hp-outboard-motor boat and using a 600-foot modern nylon gill net. The superior court found that he was not fishing on the reservation, but was fishing at "usual and accustomed grounds" and acquitted him, holding that his rights under the Treaty of Point Elliott (12 Stat. 927; January 22,

5. For a better understanding of the necessity of conservation regulations to conserve the salmon runs, see the opinion in the *McCoy* case, *supra,* and Judge Finley's concurring opinion in *State v. Satiacum,* 50 Wn.2d 535, *et seq.,* 314 P.2d 400 *et seq.* (1957).

1855) gave him immunity to closure regulations. We reversed the judgment and sent the case back for a new trial, directing that the court determine whether the regulation violated was necessary to conserve the fishery.

We agree with the trial court that the rule of the *McCoy* case, *supra*, is the proper one to be applied where treaty rights and state conservation regulations are in apparent conflict. The burden of proof, once the defendant has established that he is a member of a tribe having a treaty right to take fish at all "usual and accustomed grounds and stations," is on the state to show that its regulations, which limit Indian fishing rights either as to the time or manner of fishing, are reasonable and necessary to conserve the fishery.

(6) The United States did not hesitate to adopt regulations it regarded as necessary to preserve the halibut fishery. The Makah Tribe sued to recover damages for alleged deprivation of the fishing rights reserved to them under article 4 of their 1855 treaty (12 Stat. 1939) with the United States. The Court of Claims held that the government's regulations restricting the rights of the Makahs to fish for halibut did not amount to a breach of the treaty. *Makah Indian Tribe v. United States*, 7 Ind. Cl. Comm. 477 (1959); affirmed 151 Ct. Cl. Rep. 701 (1960); *cert. denied* 365 U.S. 879, 6 L.Ed.2d 191, 81 Sup. Ct. 1028 (1961).

The appellants have seized upon certain language in the recent case of *Maison v. Confederated Tribes of the Umatilla Indian Reservation, supra*, as establishing the rule that the particular regulation sought to be imposed by the state must be shown to be "indispensable" to the preservation and protection of the fishery sought to be regulated before it can be enforced against Indians claiming treaty rights to fish at "usual and accustomed grounds and stations."

The word "indispensable" is taken from *Tulee v. Washington, supra*, where the Supreme Court of the United States struck down a requirement for a fishing license as applied to treaty Indians.

Viewing the treaty in this light, we are of the opinion that the state is without power to charge the

> Yakimas a fee for fishing. A stated purpose of the licensing act was to provide for "the support of the state government and its existing public institutions." Laws of Washington (1937) 529, 534. The license fees prescribed are regulatory as well as revenue producing. But it is clear that their regulatory purpose could be accomplished otherwise, that the imposition of license fees is not *indispensable to the effectiveness of a state conservation program.* Even though this method may be both convenient and, in its general impact, fair, it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve. We believe that such exaction of fees as a prerequisite to the enjoyment of fishing in the "usual and accustomed places" cannot be reconciled with a fair construction of the treaty. (Italics ours.)

It was the exaction of a fee for fishing which could not be reconciled with a fair construction of the treaty.

All would agree that the imposition of license fees is not indispensable to the effectiveness of a state conservation program, but such a holding is not supporting authority for the proposition that any regulation that the state adopts must be indispensable to the success of its conservation program before that regulation is applicable to treaty Indians. We are convinced that the Supreme Court did not set up such an impossible standard in *Tulee*, nor did it intend to. The real holding in that case is

> (T)hat, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here. (Footnote omitted.) (p. 684)

Tulee and other Supreme Court decisions recognize that the state must have the necessary power of appropriate regulation to preserve a resource for the benefit of all of the people of the state. *New York ex rel. Kennedy*

v. Becker, 241 U.S. 556, 60 L.Ed. 1166, 36 Sup. Ct. 705 (1916); *United States v. Winans, supra.*

We are convinced that the three judges of the 9th Circuit Court of Appeals, who decided the *Maison* case, *supra,* read too much into the Supreme Court's use of the word "indispensable" in the *Tulee* case and have created therefrom a completely unworkable standard for determining what regulations relative to the time and manner of fishing outside the reservation may be imposed on Indians claiming treaty rights.

It would make the competent exercise of the state's inherent power of preservation an impossibility. In *New York ex rel. Kennedy v. Becker, supra,* the United States Supreme Court discussed the reserved rights of the Seneca Indians to fish in the waters on land ceded by them to Robert Morris by the treaty of the "Big Tree" of September 15, 1797[6] (7 Stat. 601). Mr. Justice Hughes, in an opinion adopted by the court after his resignation in 1916, said:

> It is said that the State would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo,* either would be free to destroy the subject of the power. Such a duality of sovereignty instead of maintaining in each the essential power of preservation would in fact deny it to both.
>
> It has frequently been said that treaties with the Indians should be construed in the sense in which the Indians understood them. But it is idle to suppose that there was any actual anticipation at the time the treaty was made of the conditions now existing to which the legislation in question was addressed. Adopted when game was plentiful—when the cultivation contemplated by the whites was not expected to interfere with its abundance—it can hardly be supposed that the thought of the Indians was concerned with the necessary exercise of inherent power under

6. Ratified by the Senate on April 11, 1798, and proclaimed by the President.

> modern conditions for the preservation of wild life. But the existence of the sovereignty of the State was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. This was clearly recognized in *United States v. Winans*, 198 U.S. 371, 384, where the court in sustaining the fishing rights of the Indians on the Columbia River, under the provisions of the treaty between the United States and the Yakima Indians, ratified in 1859, said (referring to the authority of the State of Washington): "Nor does it" (that is, the right of 'taking fish at all usual and accustomed places') "restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised." (pp. 563, 564)

Attention is particularly directed to the quotation from *United States v. Winans*, *supra*, at the end of the foregoing quotation.

In summary: We have rejected the Departments' argument that the Indian treaties are of no force and effect and that the state may repudiate them at will.

We have ruled that the trial court had no jurisdiction to determine whether or not there had been a termination of the Puyallup Indian Tribe, and that the tribe continues to exist, at least so long as it is recognized as such

by the appropriate agencies of the United States, or until Congress passes a termination act.

We have agreed with the trial court that there is no longer a Puyallup Indian Reservation, and that the Puyallup Indians no longer have any special or treaty rights to fish thereon because it was once a reservation; however, we hold that they continue to have a right to fish at usual and accustomed grounds and stations and that any regulations of the Departments limiting or restricting those rights must be reasonable and necessary for the preservation of the fishery.

The state has clearly met that test, at least to the extent that it has established that continued use by the defendants of their drift nets and set nets would result in the nearly complete destruction of the anadromous fish runs in the Puyallup River and that a regulation prohibiting the use of such nets was necessary for the preservation of the fishery.

We are, therefore, in accord with the conclusion of the trial court that an injunction should be entered in this case, however, the injunction entered by the trial court is much too broad. It permanently enjoins individual defendants and members of the federal organization known as the "Puyallup Tribe" from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington. It is predicated on the trial court's determination that the defendants have no treaty rights.

The cause must be remanded to the trial court for the entry of a judgment and decree predicated upon the proposition that the defendants do have treaty rights, but that they are subject to conservation regulations which are reasonable and necessary to preserve the fishery.

The essence of this opinion is—and the decree, as reframed, should so reflect: (1) If a defendant proves that he is a member of the Puyallup Tribe; and (2) He is fishing at one of the usual and accustomed fishing places of that tribe; (3) He cannot be restrained or enjoined from

doing so, unless he is violating a statute, or regulation of the Departments promulgated thereunder, which has been established to be reasonable and necessary for the conservation of the fishery.

The injunction should be tailored to the particular situation. A specific act or acts should be enjoined on the basis that there has been a violation of a statute or statutes, or a regulation or regulations promulgated thereunder, and that such regulation or regulations are reasonable and necessary for the preservation of the fishery. The findings, conclusions, and judgment in this case should be rewritten to show clearly the basis and the extent of the injunction.

The judgment and decree appealed from is set aside, and the cause is remanded for the purposes indicated in this opinion.

Neither the appellants nor the respondents having prevailed to the full extent of their claims, each will bear its own costs on this appeal.

FINLEY, C. J., WEAVER, and HAMILTON, J. J., and LANGENBACH, J. Pro Tem., concur.

DONWORTH, J. (concurring in part and dissenting in part)—I concur in the result reached in the majority opinion in so far as it holds that appellants in this case do have treaty rights and have standing to assert those rights in this suit, but I do not agree that the test of their right to fish is dependent on the existence or nonexistence of a state statute or regulation which has been held by the trial court to be reasonable and necessary for the conservation of fish.

I would reverse the trial court's degree of permanent injunction with directions to dismiss the action for any one or all of the three reasons stated below.

I.

I am of the opinion that:

(1) The provisions of article 3 of the Treaty of Medicine Creek are presently the supreme law of the land and are superior to the exercise of the state's police power

respecting the regulation of fishing by Indians at places where the treaty is applicable.

(2) If the Secretary of the Interior and the Commissioner of Indian Affairs have adopted the proposed rules relating to off-reservation fishing by treaty Indians, the Federal Government has assumed control of the matters in controversy in this case, and state courts may not enjoin appellants from fishing in the Puyallup River. See 30 Fed. Reg. 8969.

(3) Assuming, arguendo, that the trial court had power to enjoin such fishing, the findings of fact do not support the conclusions of law or the permanent injunction entered by it. In my opinion, this statement is correct regardless of whether the "indispensable" test or the "reasonable and necessary" test be applied.

My views on the rights of treaty Indians to fish "at all usual and accustomed grounds and stations" are stated at some length in the first opinion (signed by four judges) in *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400 (1957), and in my dissenting opinion in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963). See the decisions of the courts of last resort quoted and dicussed therein.

In the interest of brevity, I incorporate those two opinions herein by reference as a part of this opinion. In those opinions, it was stated that, under the federal constitution, the treaty was the supreme law of the land and would continue to be until:

(1) the treaty is modified or abrogated by act of Congress, or

(2) the treaty is voluntarily abandoned by the Puyallup tribe, or

(3) the supreme court of the United States reverses or modifies our decision in this case. (at 529)

In the last 9 years since the two *Satiacum* decisions were filed none of these events have taken place. Nor have respondents sought a final solution of the problem through any branch of the United States Government—legislative, executive, or the Supreme Court.

II.

In the case at bar, the United States has for the first time appeared in this court and filed a brief as *amicus curiae*. Its counsel participated in the oral argument.

The United States contends in its brief that the trial court's permanent injunction fails to give *any* recognition to the rights secured to the Indians by article 3 of the Treaty of Medicine Creek. After citing cases relating to this contention, the government's brief states:

> . . . It is enough at this point to note that the permanent injunction against fishing in the instant case, except in accordance with the regulations applicable to all, absolutely ignores the treaty-reserved rights of these Indians. Conclusion of Law IV, *supra*, is plainly contrary to *Tulee*. For this reason alone, the judgment and decree must be reversed.

It is further argued therein that the scope of the treaty-reserved rights of the Indians may best be determined by a federal authority. The reasons supporting this argument are stated as follows:

> We must start with the established principle that interpretation of a treaty with an Indian tribe, like a treaty with a foreign nation, presents a federal question. *Worcester v. Georgia*, 6 Pet. 515 (1832). Had the Treaty itself, or Congress in contemporary or subsequent legislation, more specifically defined the right reserved or regulated how it was to be exercised (which would be another way of defining its scope), there would be no problem today. For, clearly, the federal statute would prevail, and no state law or regulation could impinge upon the Indians' exercise of the right as defined or regulated. See *Missouri v. Holland*, 252 U.S. 416 (1920), where the Supreme Court rejected the argument that implementing legislation pursuant to a treaty interfered with exercise of state regulatory provisions as to wildlife.

The brief then states that, pursuant to congressional action, the Secretary of the Interior and the Commissioner of Indian Affairs have proposed the adoption of certain

rules relating to off-reservation treaty fishing which have been published in 30 Fed. Reg. 8969. The proposed rules were signed by the Under Secretary of the Interior on July 5, 1965. Whether they have yet been officially adopted, we are not advised.

I mention the government's *amicus curiae* brief at some length because this is the first indication we have had of what the government's legal or administrative position is in regard to the status of the Treaty of Medicine Creek or to a departmental solution of the problems heretofore presented to this court concerning the off-reservation fishing rights of treaty Indians.

Thus, we now have official information that the legal representatives of the government take the position that an Indian treaty is the same as a treaty with a foreign nation. I presume that this means that an Indian treaty under the Supremacy Clause of the United States Constitution is the supreme law of the land. *Cf.* first opinion in *State v. Satiacum, supra,* and cases cited therein. We are also assured that the Interior Department is proposing to take some action regarding the regulation of off-reservation fishing by treaty Indians.

III.

I desire to point out that I disagree with the majority's discussion of the holding of the Court of Appeals in *Maison v. Confederated Tribes of Umatilla Indian Reservation,* 314 F.2d 169 (9th Cir. 1963), where that court said, at 172:

> That, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed as "indispensable" to the accomplishment of the needed limitation.
>
> Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead

fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water pollution. By the time they reach the spawning ground, the body oils of the fish are practically used up, and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food.

After discussing certain testimony presented by the Oregon officials, the Court of Appeals concluded:

However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty (*Tulee v. Washington, supra*), a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), aff'd. 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fish-

ing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The word "indispensable" is said by the majority not to be supported by the two cases cited by the Court of Appeals, to wit, *Tulee v. Washington*, 315 U.S. 681, 86 L.Ed. 1115, 62 Sup. Ct. 862, and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). However, the United States Supreme Court denied the state of Oregon's petition for certiorari in the *Maison* case (375 U.S. 829, 11 L.Ed.2d 60, 84 Sup. Ct. 73).

While the denial of certiorari is not to be considered as an expression of approval of the lower court's decision, the *Maison* case involved the interpretation of a treaty which under the Supremacy Clause of the United States Constitution is the supreme law of the land, and hence could be authoritatively interpreted only by the United States Supreme Court. If the word "indispensable," in the context in which the court of appeals used it in the *Maison* case, substantially changed the meaning of the treaty as to the state's power of regulation of Indian fishing rights, one would suppose that, in view of the many conflicting decisions of various state and federal courts on this vital subject, the Supreme Court would have granted certiorari.[7]

The *Maison* decision was followed by Judge Solomon sitting in the United States District Court for the District of Oregon in *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, — F. Supp. — —(decided August 8, 1966). This case involved the right of treaty Indians to hunt game. The language of the treaty involved was similar to the treaty in the case now before us. In upholding the Indians' right under the treaty to hunt game, Judge Solomon said:

> In *Confederated Tribes of the Umatilla Indian Reservation v. Maison, et al.*, 186 F.Supp. 519, 520,

7. This is the second time that the United States Supreme Court has failed to grant a petition for certiorari which sought an authoritative ruling on the status of an Indian treaty with respect to state police power. See discussion of *State v. Arthur*, 74 Ida. 251, 261 P.2d 135 (1953), found in *State v. Satiacum*, 50 Wn.2d at pages 525-529.

I construed this article to mean that the State may not restrict the off-reservation fishing rights, set forth in the treaty without showing that such restriction was necessary for conservation of the fish. The Court of Appeals in affirming this decision laid down the test to be applied to State-imposed restrictions of treaty rights:

". . . while a restriction of the fishing activities of the plaintiffs must be *indispensable*, . . . a restriction of the fishing activities of other citizens is valid if merely reasonable . . ." (314 F.2d 169, 174 emphasis is original).

. . .

In other words, defendants here contend that in spite of the provisions of the treaty, the Indians have no greater rights to fish and hunt off their reservation than any other Oregon citizen. This contention was made and rejected in *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942); and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951).

. . .

No one disagrees with the defendants' argument that regulation of fish and game resources is necessary and desirable, and that an intolerable situation would arise if all citizens were permitted to fish or hunt without restriction. However, the issue here is whether a State is permitted to proscribe or limit the treaty rights of Indians without showing that such restriction is indispensable. *Confederated Tribes, supra.*

Until the Supreme Court holds that the term "indispensable" is not the correct test to be used in determining the validity of state laws and regulations vis-a-vis the fishing rights of treaty Indians, I think that this court should not read the word out of the *Maison* decision and substitute "reasonable and necessary" therefor.

Even if the rule approved by the majority decision in the case at bar is followed (*i.e.* that the state has the burden of proving that its regulations are reasonable and

necessary to conserve the fishery), I see no need for a further hearing.

The trial court stated in its memorandum decision that the total amount of salmon caught by Indians in the entire state in 1964 was only between 3 per cent and 5 per cent of the total number taken by Indians and non-Indians.

The trial court found the facts as to the fishing activities of appellants to be:

> XIII. That the individual defendants began openly fishing the Puyallup River in 1953 contrary to the laws, rules and regulations of the State of Washington. Since that time, the defendants have gradually increased the intensity of their drift net and set net fisheries, using modern nylon monofilament nets, to the point that the anadromous fish runs of the Puyallup River are presently unable to maintain themselves in an abundant supply without supplemental plantings by the state.
>
> XIV. The Puyallup River from Commencement Bay to its upper tributaries constitutes and is a prime spawning and rearing area for anadromous fish.
>
> XV. The defendants have indicated that unless restrained from so doing, they will continue to fish in the Puyallup River and Commencement Bay in the manner in which their fishing activities have taken place since 1953.
>
> XVI. That the place, time, and manner of fishing by the defendants was and is in violation of the rules, and regulations of the State of Washington. That the fishing activities of the defendants, if allowed to proceed unrestrained could result in the destruction of serious impairment of the anadromous fish runs of the Puyallup River.
>
> XVII. That once anadromous fish runs in a river system have been destroyed, it is generally impossible to reestablish them.
>
> XVIII. It is reasonable and necessary that state conservation, rules and regulations be uniformly ap-

plied to all citizens on an equal basis including the defendants.

The ultimate finding of fact is that the fishing activities of appellants, if not restrained, *could* result in the destruction or serious impairment of the anadromous fish runs on the Puyallup River.

The above quoted findings do not, in my opinion, support the conclusion that:

> It is reasonable and necessary that state conservation rules and regulations be uniformly applied to all citizens on an equal basis including the defendants.

Neither do they justify the entry of the trial court's judgment and decree which contained the following injunctive provision:

> It is hereby Ordered, Adjudged, and Decreed That:
>
> The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Game of the State of Washington.

I agree with the following statement made in the brief of the *amici curiae* Association on American Indian Affairs, Inc., as to the effect of the trial court's permanent injunction quoted above wherein it is said:

> The decision below concerning the purported nonexistence of the Puyallup Tribe today is novel, wholly contrary to well-established principles of Indian law, and completely at odds with sound public policy. In the first place, only Congress, and clearly not the State courts, has power to effect the termination of tribal status. *Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. McGowan*, 302 U.S. 535, 538 (1938); *United States v. Nice*, 241 U.S. 591, 598 (1916); *United States v. Sandoval*, 231 U.S. 28 (1913). Indeed, the rule that sole responsibility

for declaring when tribal existence has ended is vested in Congress has particular pertinence in this case where withdrawal of recognition from the Puyallup Tribe (at least in the view of the lower court) effectively would abrogate a solemn treaty commitment of the United States.

As indicated above, I likewise agree with the closing statement in the brief of the *amicus curiae* Association of Indian Affairs, Inc., which states:

> The Superior Court's Findings of Fact and Conclusions of Law clearly fail to measure up to this standard. Neither the findings nor the memorandum deal with the critical question—i.e., whether the State could accomplish its conservation objectives through more rigorous regulation of non-Indian fishing or by other means not having an impact upon appellants. Similarly, the court below appears not to have considered whether preservation of the Puyallup River fishery, assuming the need for regulation, requires so severe a curtailment of Indian fishing as the respondents here seek to impose. Such disregard for the applicable law, particularly as enunciated by the United States Court of Appeals for this Circuit, cannot be allowed to stand.
>
> In summary, unlike their non-Indian fellow-citizens, enrolled members of the Puyallup Tribe have a vested property right under the Treaty of Medicine Creek to fish at all usual and accustomed places outside their reservation. This off-reservation right to take fish, so essential to the Indians' very existence, is protected under Federal law, and, at the very least, may be limited by State law only under extraordinary circumstances. As a matter of law, the Washington conservation statutes and regulations may not be enforced against Indian treaty fishing rights in the same manner as they are against the bare fishing privileges of other persons. In the former situation, unlike the latter, the State of Washington has the burden of proving affirmatively that application to appellants of the attempted regulations is indispensable to the conservation of the fish resource

and the task of further proving that the desired conservation goals cannot be achieved in some other fashion. Respondents made no such showing in the lower court.

Unless it be held that Indian treaties are not treaties within the meaning of the Supremacy Clause of the United States Constitution and hence are not the supreme law of the land and do not override the police power of the states (contrary to the holding of the Supreme Court, cited below),[8] I can only reach the conclusion that the judgment and decree of the trial court should be reversed with directions to dismiss the action.

I am further of the opinion that respondents have failed to prove either that the state laws and regulations here involved are *either* indispensable or reasonably necessary to the conservation of salmon fishery on the Puyallup River and hence would reverse and dismiss for that reason.

HUNTER, J. (dissenting)— I dissent. The ultimate holding of the majority is that the Puyallup Indians are subject to *regulations reasonable and necessary* for the preservation of the fishery. The majority's modification of the trial court's injunction when read with this holding is not consistent. The trial court properly applied our existing conservation laws to the Puyallup Indians by its injunction. The power of the state of Washington to regulate fishing for purposes of conservation has been clearly recognized as applying to the Indians *equally with others* by the United States Supreme Court in the case of *Tulee v. Washington*, 315 U.S. 681, 684, 86 L.Ed. 1115, 1119, 62 Sup. Ct. 862, 864 (1941). In this case Justice Black for the court stated:

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8. See cases discussed in the first *Satiacum* opinion (50 Wn.2d at pages 516-519).

In *State v. Quigley*, 52 Wn.2d 234, 324 P.2d 827 (1958), a case in which a non-treaty Indian claimed the right to hunt deer on his own property without a hunting license, this court, in a unanimous en banc opinion concluded with this dictum: "Of course, a treaty takes precedence over a state law, but appellant has no treaty rights that restrict the state in its exercise of the police power. Our question, therefore, must be answered in the affirmative."

> We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while *the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here. (Italics mine.)

Our present laws and regulations relating to the use of gear, and the time and place of taking fish are for no other purpose than the reasonable and necessary preservation of the fishery. These laws and regulations accomplish the purpose of the ultimate holding of the majority and therefore should have been imposed on the Indians *equally with others* as was done by the trial court.

In my opinion the ultimate holding of the majority is consistent with the injunction entered by the trial court, and there is no need for its modification.

ROSELLINI and HALE, JJ., concur with HUNTER, J.

HALE, J. (concurring in the dissent)—I agree with and have signed Judge Hunter's dissenting opinon. As a preface to further comment, it should be noted that this case has nothing to do with protecting or preserving for the Indians any rights in land or personal property or fostering their management of business or tribal affairs. It involves only the claims of a right to fish in places where all others are forbidden.

Appellants assert the right under a treaty to violate the laws of a sovereign state, laws designed to preserve, protect and develop a great natural resource that contributes vastly to the economic and recreational welfare of millions of its citizens. Appellants claim powers which, if exercised in full, will inevitably destroy this resource in the Puyallup River.

I find no language in the Treaty of Medicine Creek (10 Stat. 1132) concluded December 26, 1854, by Isaac I. Stevens, Governor and Superintendent of Indian Affairs of the Territory of Washington, on behalf of the United

States and the "chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawskin, S'Homamish, Stehchass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians,"[9] warranting the conclusion that the Indians should be forever immune from the state's game and fishery laws. The most cogent language of the treaty, that particular phraseology designed to prevent unfair and invidious discrimination against the Indians and which vouchsafed to them the right to hunt and fish, granted these very rights *in common with all citizens of the territory*. See Treaty with Nisqualli, Puyallup, Etc., 1854, art. 3, 2 Indian Affairs, Laws and Treaties 496 (1902). As I would permit no discrimination against the descendants of the Puyallups, I would allow no discrimination in their favor either.

In my opinion, most of the decisional law written about Indian treaties, although intended to protect the American Indian in the rights to property and the pursuit of happiness has had a contrary effect. Decisions relating to Indian treaties begin with the hope of protecting the Indian, and inevitably end by treating the Indians as aborigines, and in doing so not only have tended to degrade the Indian and perpetuate the stigma of second-class citizenship earlier surrounding him but blinded this country to the need for legislation which will genuinely rehabilitate our Indian citizens and enable them to play a full and active role in the affairs of this state and country in common with all citizens of whatever racial origin.

The majority decision fosters an illusion that somehow by regarding the Treaty of 1854 as a device to confer upon shareholder members in appellant, The Puyallup Tribe, Inc., special privileges, immunities and emoluments not shared equally with descendants of the white settlers of 1854 or the citizenry at large, the courts are righting a wrong long suffered by the Indians.

But while intending otherwise, the opinon discriminates in favor of the Indians, granting to a few of them

9. 2 Indian Affairs, Laws and Treaties 495 (1902).

special favors, privileges and immunities not claimed or shared by other Indians, and perpetuating the idea that a treaty with the natives in 1854 is a viable compact with their remote descendants. In holding thus, the decision again delays the day when some descendants of the Puyallups will achieve full responsibility as citizens. I would put an end to such an invidious and discriminatory concept, and read the treaty as it was written.

Next, on the question of tribal existence, I think the evidence establishes and the learned trial judge rightly found that appellant, The Puyallup Tribe, Inc., never acquired nor now has any rights under the treaty. I believe that the tribe or band which signed the Treaty of Medicine Creek of 1854 has long since disappeared, its lands sold and descendants absorbed into the body politic and that the conclusion of the learned trial judge that

> There is no presently existing Puyallup Tribe of Indians which succeeds in interest to the original Puyallup Indian Tribe which was signatory to the Treaty of Medicine Creek.

is well supported by both the history of the tribe and the evidence in the case. This finding and the judgment should be affirmed.

REMITTITUR FROM WASHINGTON STATE SUPREME COURT TO PIERCE COUNTY SUPERIOR COURT (Trial Court)

Olympia Dated March 15, 1967

The State of Washington to: The Superior Court of the State of Washington in and for Pierce County

This is to certify that the opinion of the Supreme Court of the State of Washington filed on January 12, 1967, became the final judgment of this court in the above entitled case on March 13, 1967. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached certified copy of the opinion.

AMENDED INJUNCTION OF PIERCE COUNTY SUPERIOR COURT (Trial Court) IN COMPLIANCE WITH REMITTITUR

This matter having come on regular for hearing before this court upon the motion of plaintiffs and defendants to amend the permanent injunction heretofore entered by this court, the plaintiffs and defendants being represented by counsel, and the court being fully advised; now therefore,

IT is hereby ordered, adjudged, and decreed that:

The individual defendants and all members of the federal organization known as the "Puyallup Tribe" are hereby permanently enjoined from driftnet or setnet fishing in the Puyallup River watershed and Commencement Bay in any manner that is contrary to the laws of the State of Washington or contrary to the rules and regulations of the Department of Fisheries of the State of Washington and the Department of Game of the State of Washington.

DONE IN OPEN COURT this 2nd day of June, 1967.
John D. Cochran, *Judge of the Superior Court*

MEDICINE CREEK TREATY
(R.D. EX. A)

FRANKLIN PIERCE
President of the United States of America

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, on the twenty-sixth day of December, one thousand eight hundred and fifty-four, between the United States of America and the Nisqually and other bands of Indians, which treaty is in the words following, to wit:—

Articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-

four, by Isaac L. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steh-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians, occupying the lands lying round the head of Puget's Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, to wit: Commencing at the point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence running in a southeasterly direction, following the divide between the waters of the Puyallup and Dwamish, or White rivers, to the summit of the Cascade Mountains; thence southerly, along the summit of said range, to a point opposite the main source of the Skookum Chuck Creek; thence to and down said creek, to the coal mine; thence northwesterly, to the summit of the Black Hills; thence northerly, to the upper forks of the Satsop River; thence northeasterly, through the portage known as Wilkes's Portage, to Point Southworth, on the western side of Admiralty Inlet; thence around the foot of Vashon's Island, easterly and southeasterly, to the place of beginning.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of land, viz: The small island called Klah-che-min, situated opposite the mouths of Hammersley's and Totten's inlets, and separated from Hartstene Island by Peale's Passage, containing about two sections of land by estimation; a square tract containing two sections, or twelve hundred and eighty acres, on Puget's Sound, near the mouth of the She-nah-nam Creek, one mile west of the meridian line of the United States land survey, and a square tract containing two sections, or twelve hundred

and eighty acres, lying on the south side of Commencement Bay; all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe and the superintendent or agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through their reserves, and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of thirty-two thousand five hundred dollars, in the following manner, that is to say: For the first year after the ratification hereof, three thousand two hundred and fifty dollars; for the next two years three thousand dollars each year; for the next three years two thousand dollars each year; for the next four years fifteen hundred dollars each year; for the next five years twelve hundred dollars each year, and for the next five years one thousand dollars each year; all which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who

may from time to time determine, at his discretion, upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE V. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of three thousand two hundred and fifty dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE VI. The President may hereafter, when in his opinion the interests of the Territory may require, and the welfare of the said Indians be promoted, remove them from either or all of said reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment be made accordingly therefor.

ARTICLE VII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens. And should any one or

more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article, in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same; and, therefore, it is provided, that any Indian belonging to said tribes, who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratificaton hereof, and to support, for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands, in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer, for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance, to be defrayed by the United States, and not deducted from the annuities.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States; nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

ARTICLE XIII. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian Affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands, have hereunto set their hands and seals at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS,

Governor and Superintendent Territory of Washington.

Qui-ee-metl,	his x mark. [L. S.]
Sno-ho-dumset,	his x mark. [L. S.]
Lesh-high,	his x mark. [L. S.]
Slip-o-elm,	his x mark. [L. S.]
Kwi-ats,	his x mark. [L. S.]
Stee-high,	his x mark. [L. S.]
Di-a-keh,	his x mark. [L. S.]
Hi-ten,	his x mark. [L. S.]
Squa-ta-hun,	his x mark. [L. S.]
Kahk-tse-min,	his x mark. [L. S.]
Sonan-o-yutl,	his x mark. [L. S.]
Kl-tehp,	his x mark. [L. S.]
Sahl-ko-min,	his x mark. [L. S.]
T'bet-ste-heh-bit,	his x mark. [L. S.]
Tcha-hoos-tan,	his x mark. [L. S.]
Ke-cha-hat,	his x mark. [L. S.]
Spee-peh,	his x mark. [L. S.]
Swe-yah-tum,	his x mark. [L. S.]
Chah-achsh,	his x mark. [L. S.]
Pich-kèhd,	his x mark. [L. S.]

S'klah-o-sum,	his x mark. [L. S.]
Sah-le-tatl,	his x mark. [L. S.]
See-lup,	his x mark. [L. S.]
E-la-kah-ka,	his x mark. [L. S.]
Slug-yeh,	his x mark. [L. S.]
Hi-nuk,	his x mark. [L. S.]
Ma-mo-nish,	his x mark. [L. S.]
Cheels,	his x mark. [L. S.]
Knutcanu,	his x mark. [L. S.]
Bats-ta-kobe,	his x mark. [L. S.]
Win-ne-ya,	his x mark. [L. S.]
Klo-out,	his x mark. [L. S.]
Se-uch-ka-nam,	his x mark. [L. S.]
Ske-mah-han,	his x mark. [L. S.]
Wuts-un-a-pum,	his x mark. [L. S.]
Quut-a-tadm,	his x mark. [L. S.]
Quut-a-heh-mtsn,	his x mark. [L. S.]
Yah-leh-chn,	his x mark. [L. S.]
To-lahl-kut,	his x mark. [L. S.]
Yul-lout,	his x mark. [L. S.]
See-ahts-oot-soot,	his x mark. [L. S.]
Ye-tahko,	his x mark. [L. S.]
We-po-it-ee,	his x mark. [L. S.]
Kah-sld,	his x mark. [L. S.]
La'h-hom-kan,	his x mark. [L. S.]
Pah-how-at-ish,	his x mark. [L. S.]
Swe-yehm,	his x mark. [L. S.]
Sah-hwill,	his x mark. [L. S.]
Se-kwaht,	his x mark. [L. S.]
Kah-hum-klt,	his x mark. [L. S.]
Yah-kwo-bah,	his x mark. [L. S.]
Wut-sah-le-wun,	his x mark. [L. S.]
Sah-ba-hat,	his x mark. [L. S.]
Tel-e-kish,	his x mark. [L. S.]
Swe-keh-nam,	his x mark. [L. S.]
Sit-oo-ah,	his x mark. [L. S.]
Ko-quel-a-cut,	his x mark. [L. S.]
Jack,	his x mark. [L. S.]
Keh-kise-be-lo,	his x mark. [L. S.]
Go-yeh-hn,	his x mark. [L. S.]
Sah-putsh,	his x mark. [L. S.]
William,	his x mark. [L. S.]

Executed in the presence of us:—

M. T. Simmons, *Indian Agent.*
James Doty, *Secretary of the Commission.*
C. H. Mason, *Secretary Washington Territory.*
W. A. Slaughter, *1st Lieut. 4th Infantry.*
James McAlister,
E. Giddings, Jr.
George Shazer,
Henry D. Cock,
S. S. Ford, Jr.
John W. McAlister,
Clovington Cushman,
Peter Anderson,
Samuel Klady,
W. H. Pullen,
P. O. Hough,
E. R. Tyerall,
George Gibbs,
Benj. F. Shaw, *Interpreter,*
Hazard Stevens.

And whereas the said treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the third day of March, one thousand eight hundred and fifty-five, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:—

"In Executive Session, Senate of the United States,
"*March* 3, 1855.

"*Resolved*, (two thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the articles of agreement and convention made and concluded on the She-nah-nam, or Medicine Creek, in the Territory of Washington, this twenty-sixth day of December, in the year one thousand eight hundred and fifty-four, by Isaac I. Stevens, governor and superintendent of Indian affairs of the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the Nisqually, Puyallup, Steilacoom, Squawksin, S'Homamish, Steth-chass, T'Peeksin, Squi-aitl, and Sa-heh-wamish tribes and bands of Indians occupying the lands lying round the head of Puget's

Sound and the adjacent inlets, who, for the purpose of this treaty, are to be regarded as one nation, on behalf of said tribes and bands, and duly authorized by them.

"Attest:

ASBURY DICKINS, *Secretary.*"

Now, therefore, be it known that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the third day of March, one thousand eight hundred and fifty-five, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, having signed the same with my hand.

(L.S.) Done at the city of Washington, this tenth day of April, in the year of our Lord one thousand eight hundred and fifty-five, and of the independence of the United States the seventy-ninth.

FRANKLIN PIERCE

By the President:
W. L. Marcy, *Secretary of State.*

EXECUTIVE ORDER OF 1873
PART III. EXECUTIVE ORDERS RELATING TO RESERVES.

Puyallup Reserve.

[Area, 1 square mile; occupied by Muckleshoot, Nisqualli, Puyallup, Skwawksnamish, Stailakoom and five other tribes; treaty December 22, 1854.]

(For Executive order of January 20, 1857, see "Nisqually Reserve.")

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, August 26, 1873

SIR: By the second article of the treaty concluded with the Nisqually and other Indians December 26, 1854 (Stat. at Large, vol. 10, p. 1132). "a square tract containing two sections, or 1,280 acres, lying on the south side of Com-

mencement Bay," was set apart as a reservation for said Indians, and is known as the Puyallup Reserve.

It appears from the records of this office that Governor Stevens, finding the Indians dissatisfied with the size and location of the reserve, as indicated by said treaty, agreed, at a conference held with them August, 1856, to a readjustment of said reservation, the exterior boundaries of which were surveyed and established by his order. This was done prior to the extension of the lines of the public surveys over the surrounding and adjacent lands. A map of the survey was transmitted by Governor Stevens to this office, under date of December 5, 1856, giving a description of the courses and distances of said exterior boundaries of the reserve, as taken from the field-notes of the survey on file in the office of superintendent Indian affairs, Washington Territory.

This reservation, as readjusted and indicated on said map, was set apart for these Indians by Executive order dated January 20, 1857. It was intended to have this reservation bounded on its western side by the waters of Commencement Bay, from the southeasterly extremity of said bay, around northwardly to the northwest corner of the reservation on the southerly shore of Admiralty Inlet. The survey was thought to be made so as to give to the Indians this frontage upon the bay, with free access to the waters thereof. More recent surveys, however, develop the fact that there is land along this shore, and outside the reservation, arising from an error of the surveyor in leaving the line of low-water mark, along the shore of said bay, and running a direct line to the place of beginning.

In a report dated March 20 last, Superintendent Milroy calls attention to this inadvertence; and for the adjustment of the western boundary of said reservation, so that it may conform to the intentions of those agreeing to the same, as well as for the comfort and wants of the Indians, he recommends the following change, viz: Instead of the direct line to the place of beginning, to follow the shore line, at low-water mark, to the place of beginning.

Inasmuch as the lands proposed to be covered by this change are in part already covered by the grant to the Northern Pacific Railroad Company and by donation claims, I would respectfully recommend that the President be requested to make an order setting apart for the use of these Indians an addition to said Puyallup Reservation, as follows, viz: All that portion of section 34, township 21 north, range 3 east, in Washington Territory, not already included within the limits of the reservation. This would give them a mile of water frontage directly north of Puyallup River, and free access to the waters of Commencement Bay at that point.

Very respectfully, your obedient servant,

H. R. CLUM,
Acting Commissioner.

The HON. SECRETARY OF THE INTERIOR.

WASHINGTON—QUILEUTE RESERVE.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., August 28, 1873.

SIR: I have the honor to transmit herewith a copy of a communication addressed to this Department on the 26th instant, by the Acting Commissioner of Indian Affairs, relative to the extension by Executive order of the reservation in Washington Territory known as the Puyallup Reservation, described as follows, to wit: All that portion of section 34, township 21 north, range 3 east, in Washington Territory, not already included within the limits of the reservation.

I agree with the Acting Commissioner in his views, and respectfully request that in accordance with his recommendation an Executive order be issued setting apart the tract of land described for the purpose indicated.

I have the honor to be, etc.,

W. H. SMITH, *Acting Secretary.*

THE PRESIDENT.

EXECUTIVE MANSION, *September* 6, 1873.

Agreeable to the recommendation of the Acting Secretary of the Interior, it is hereby ordered that the Puyallup Reservation in Washington Territory be so extended as to include within its limits all that portion of section 34, township 21 north, range 3 east, not already included within the reservation.

U. S. GRANT.

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(R.S. 644)

J. E. LASATER'S TESTIMONY (R.S. 644-649)

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you please state your name and address, sir?

"A. J. E. Lasater, 4410 Robbins Road, Olympia.

"THE WITNESS: L-a-s-a-t-e-r.

"THE COURT: Is that L-a-s-s-i-t-e-r?

"THE COURT: L-a-s-a-t-e-r.

"Q. What is your present occupation?

"A. I am Assistant Director of the Department of Fisheries.

"Q. And could you tell us what your educational background is?

LASATER, Direct

(R.S. 645)

"A. Yes, sir. I graduated from High School in Montana, and after a time in the service I attended the College of Fisheries, University of Washington; graduated in 1950 with a Bachelor of Science degree in Fisheries.

I pursued graduate studies for a little under a year, and then came to the Department of Fisheries.

"Q. And what have you done with the Department then since you came with them?

"A. Actually the, my experience in Fisheries goes back just a little bit further. While in High School I worked part-time in a fish hatchery in Montana,

and with the Department of Fisheries. I worked first testing the effect of the various pollutants on salmon, and on fish organisms, and salt water conversions.

I went from there into the, as project leader in the sports fishery section, then to the, Senior Biologist in charge of all Fish Management in the Department of Fisheries, and then to my present position.

"Q. I see. And are you authorized, Mr. Lasater, today to speak on behalf of the Director of the Department of Fisheries?

"A. I am so authorized.

"Q. Could you tell us what the Department of Fisheries' position is regarding the situation which has developed here on the Puyallup River? The Indian fishery?

LASATER, Direct

(R.S. 646)

"MR. CONE: Well, now, just a moment.

"Your Honor: I assume we are trying a lawsuit with questions of fact to be presented.

"Now, I assume from your statement, sir, that he is authorized to speak for the Director, then he becomes for our purposes the party opponent, perhaps, but I feel that, well, he can give an opinion; I question what relevance to these proceedings, sir, that the position of the Department of Fisheries, that is, certainly on that broad scope, what relevancy this might have to our lawsuit.

"MR. CONIFF: Oh, if your Honor please, you might recall at the end of yesterday's session Counsel very impressively made an offer of proof which I think might leave a misleading impression with this Court, and I, too, question the relevancy, I agree, but I do think that in all fairness we should be permitted to refute this inference.

"THE COURT: Well, I think, without trying to be funny, that as of today the Department opposes what is going on in the Puyallup River.

"Now, if you want to be that simple, that is about what it amounts to, isn't it?

"MR. CONIFF: That is right.

"THE COURT: I am going to sustain the objection.

LASATER, Direct, Colloquy

(R.S. 647)

By Mr. Coniff:

"Q. Now, Mr. Lasater, are you familiar with the Indian fishery that has developed here in the Puyallup River?

"A. I am.

"Q. And as a biologist, do you have an opinion regarding its effect on the fishery population of the Puyallup River system?

"A. I do have an opinion.

"Q. Would you please state that opinion?

"MR. MCLEOD: I object.

"MR. CONE: Your Honor, I will object until he lays a foundation for the opinion.

"THE COURT: Objection sustained. No proper foundation is laid.

"Q. Mr. Lasater, in connection with your duties which the Department—

"MR. MCLEOD: I am sorry, I can't hear you, Counsel.

"Q. Mr. Lasater, can you describe the Puyallup River in terms of salmon production?

"A. Yes, I can.

"Q. Would you do so, please?

"A. It is a good salmon producer, and I base this on being on the stream, on stream surveys, estimating spawning capacity, and on Department records of escapement, and in part upon the catch that has been made in the river in recent years.

"Q. Now, you have, I gather, visited the river itself on many occasions—

LASATER, Direct

(R.S. 648)

"A. Yes.

"Q. —Connection with your job with the Department? And do you have an opinion regarding the effect of the fishery which you have--have you observed the fishery there?

"A. I have.

"Q. Assuming, Mr. Lasater, that what is marked on Plaintiff's Exhibit No. 26 here, at the mouth of the Puyallup River, portrays a series of nets, assuming further that these nets are in operation seven days a week, and virtually constantly operating, remaining in this place, do you have an opinion regarding the effect of operation of just these nets at the mouth of the river in Commencement Bay upon anadromous fish stocks of the Puyallup River?

"A. Yes.

"MR. CONE: Your Honor, I will object on this basis: Counsel's question, hypothetical question, assumes that those nets are—I assume the phrase of almost constantly or practically constantly means twenty-four hours a day, 365 days per year, there is no evidence in this record to support that contention.

"MR. CONIFF: Your Honor, there is evidence in the record to support that part of the hypothetical, in that the testimony of many of the game protectors has been that every time they have patrolled this area during the past year or two, they have seen these nets, they have observed them, and that they

(R.S. 649)

have observed them on week-ends, during the night and during the day.

"I think upon this we can say that for the purposes of this hypothetical at any rate that they are almost constantly in operation, which was the form of the hypothetical.

"THE COURT: I am going to overrule the objection, and I think Counsel has, can develop this on cross examination, and it may affect its weight.

"MR. MCLEOD: I would like to inquire of this

witness on *voir dire*, your Honor.

"THE COURT: In what respect?

"MR. MCLEOD: Concerning his competency to testify concerning this factor, and other factors.

"I don't believe there is any indication in his testimony so far that he is competent to testify concerning—

"MR. CONIFF: I believe the witness has testified he is a graduate of the University of Washington College of Fisheries, and has been working with the Department of Fisheries in various capacities since—

"THE COURT: I think it is something I would like to know as a preliminary, and I will allow Mr. McLeod to examine on *voir dire*.

LASATER, Direct Colloquy

(R.S. 876)

"REDIRECT EXAMINATION

By Mr. Coniff:

"Q. Mr. Lasater, one thing here on the last sheet of what has been admitted now as Exhibit M, there is listed mortality factors.

"When you gave your testimony regarding those, were those all the mortality factors, or were these only the actual cause factors that you considered?

"A. Mortality factors other than fishing, largely.

"Q. I see. I just wanted to clarify that.

"So perhaps to be accurate—

"MR. CONIFF: If I may mark your sheet?

"MR. CONE: Please do.

"MR. CONIFF: We can mark that on there.

"Q. So we will put it as Mortality Factors, Natural?

"A. Not entirely natural. There is pollution in "c."

"Q. I see.

"A. Other than fishing.

"Q. So this would be mortality factors other than fishing. Am I correct in saying that these are just the ones you happen to recall now, so this may not be an exclusive list?

"A. It is not.

"Q. Now, Mr. Lasater, I believe on cross examination quite a bit of time was spent on the development of the theory or the fact that the regulations, or the fact that the Puget Sound fishery, both commercial and sports, take quite a percentage of

LASATER, Cross

(R.S. 877)

the total amount of stock produced by all of the various streams in Puget Sound.

"Now, what in your opinion would be the effect of attempting to regulate the Puget Sound commercial and sports fisheries solely on the basis of of any particular river stock, for example the Puyallup River stock, if this could be done?

"A. If an entire fishery were, for instance, shut down in order to protect the Puyallup River stock, it would interfere with fisheries destined to all the other streams with which they are commingled. It wouldn't be practical.

"Q. I see. In other words, for instance the lower Puget Sound stock would be commingled, of other rivers, would be commingled with the Puyallup River stock at the time that commercial fishery is occurring in Puget Sound?

"A. For instance, the silver salmon run is assessed in its general strength in Puget Sound, that is the rivers will react similarly in Puget Sound, in other words, if the silver run is up, well, in general, generally all streams will be up.

"Then as you get closer and closer to the river mouth, you can be more and more concerned with a particular river and enact regulations which will protect a particular stock as you approach that particular stream.

"Q. I see.

LASATER, Redirect

(R.S. 878)

"MR. CONIFF: Now, I might state to Counsel and to the Court that I haven't as yet received copies

of the Puyallup Fishing Regulations, so I am going to ask the witness to look at page 102 of the Hearing before the Subcommittee on Indian Affairs, the Committee on Interior and Insular Affairs, United States Senate, wherein is reproduced a copy of what purports to be a Fishing Regulation adopted by the Puyallups.

"Will there be any objection to the use of this document?

"MR. CONE: No objection.

"MR. CONIFF: (Hands to witness.)

"THE COURT: What was the page?

"MR. CONIFF: That would be page 102.

"THE WITNESS: 102.

"Q. Now, I would ask you, Mr. Lasater, as a biologist, to render an opinion as to whether or not this particular, this set of regulations, this particular regulation as it appears there, is biologically sound in light of a conservation interest, conservation interests or programs that you are attempting to maintain.

"Q. Would you go ahead and run through them, please?

"A. There are ten points.

LASATER, Redirect

(R.S. 879)

"A. Actually, the paragraph before the first point states that, The Rules and Regulations cover the Puyallup River within the original boundaries and all usual and accustomed grounds on the ceded area of the 'Medicine Creek Treaty.' "

"I would believe that this would concern all of Puyallup watershed from the mouth to the very headwaters.

'1. One set net per Puyallup fisherman in operation.'

"It is difficult for me to comment on this because I don't know how many Puyallups there are, or what degree of blood is concerned, and so I can't have any idea how many over-all nets this might concern us with.

'2. One drift net per Puyallup fisherman in opera-

tion and all drift nets shall have right-of-way of the channel.'

"The same remark as per number 1, I don't know how many drift nets this would be.

'3. No set net closer than 600 feet apart, except at a natural eddy.'

"The definition of a natural eddy would have to be well understood. There are eddies all along a stream, so in our regulations we wouldn't be able to hold a distance between the nets based on a wording such as this.

'4. No set net to have more than 20 feet shore lines, combines net and line limit not to exeed 200 feet.'

LASATER, Cross

(R.S. 880)

"The 200-foot limit will easily encompass most of the river, and when we combine this with not knowing how many of these might be set, this could be a great amount of gear.

'5. Only a Puyallup Indian or the legal spouse of a Puyallup Indian may fish.'

"Now, I wouldn't know how many Indians this might encompass, based on blood line, or whatever. The next one.

'6. Length of drift net in the river shall not be more than 35 fathoms.'

"A little over two hundred feet. This will encompass most of the river. It could hardly be considered truly protective.

'7. Length of drift net on all salt water fishing shall not be more than 1,800 feet and said drift net shall not be closer to east shore of Commencement Bay than one-half of a mile.'

"The 1800 feet I believe approximates or is the same as our regulation on a drift net, but within the confined limits of the bay and with a set net fishery at the mouth of the bay, it must—I would conclude it must have something to do with interference of drift nets with set nets,

because there will be net gear fishing in the entire area.

'8. No Puyallup Indian can hire any outside fisher-

LASATER, Cross

(R.S. 881)

man to help him or run anyone's gear.'

"That is not conservation. I wouldn't comment on it.

'9. Thirty-six hours of closure for conservations shall start at 6 p.m. Saturday and end at 6 a.m. on Monday.'

"That is nowhere near a long enough time to allow a sufficient spawning escapement of fish up the Puyallup River with the lengths and types of gear and with what I would consider to be a large potential number of nets.

"Q. Mr. Lasater, would you consider the system of regulation—

"A. There is one more point.

"Q. Oh, excuse me. Please continue.

"A. Oh, the point is on a fee to the tribe. It has nothing to do with conservation.

(R.S. 882)

By Mr. Coniff:

"Q. Now, Mr. Lasater, you consider this system of regulation that you have just read there to be biologically sound, or unsound, in the light of your knowledge of the conservation needs of the Puyallup River system?

"A. It would be unsound, based on the river fisheries that I know of for salmon, which I know of.

"For example, the very large rivers, the Columbia, and the Fraser River system, which are very large rivers, and which have longer closures, and much more severe restrictions, are needed, even on a larger river.

"And our experience has been that a net fishery, such as this, on a small river is not amenable to control. You can't control the fishery well enough to insure the spawning stock in the Fraser River, which is a much larger river.

"The Salmon Commission has in their documents that the net fishery is capable of catching 98 per cent of the fish in the river.

"Q. That is on the Fraser River?

"A. And that is a very, very big river.

"Q. That is on the Fraser?

"A. Right.

"Q. Now, could you give us a comparison in size between the Fraser and the Puyallup, in terms of the water flow, or fish population, or something along this line?

LASATER, Redirect

(R.S. 883)

"A. Well, in both flow and population, it must be well over a hundred times the size of the Puyallup.

"Q. Now, Mr. Lasater, do you know of any fishery anywhere, either sports or commercial, which is not regulated?

"A. Salmon fishery or any fishery?

"Q. Excuse me, I should restrict the question to salmon fishery.

"A. None except for possibly some Indian fisheries.

"Q. Now, in your cross examination there was quite a bit of testimony regarding various catches of the various salmon species in the Puget Sound, and out in the ocean; is a catch or a catch record itself necessarily an indication of the total size of run of the particular specie, or stock of salmon?

"A. No. I believe we spoke of the 1960 silver run. The catch was very small that year, partly because there was a small run, but a very major factor was a complete closure over a long period of time, so that silvers would not be taken in the fishery and we would get our spawning escapement.

"Q. By the way, in connection with any of your answers, you may refer to the annual report, if you have one with you?

"A. (No response.)

"Q. Now, I believe on your cross examination you tes-

tified that the regulation of the upstream migrants or adult fish, as they began their migration to

LASATER, Redirect

(R.S. 884)

the stream of origin from the ocean, I believe you said 'more significant' or 'more critical' or something along this line; is that correct?

"A. Yes.

"Q. Could you explain what you meant when you testified that this of such importance to you as Assistant Director of the Department of Fisheries, and as a biologist?

"A. As the fish come through the fishery, you assess the size of the run in the general area, then you take a look at the regulations that you already have in effect, and judge whether they are going to be sufficient to guarantee a spawning escapement to this stream in general.

"Then as the run approaches closer to the particular stream,—we have the Puget Sound divided into various fishing areas, and if the run to a particular stream, or group of similar streams and area, appears to be lower than the average that we have been looking at, then further restrictions will be placed in the particular areas which will affect those particular streams.

"So that as the fish approaches the stream our knowledge of the precise run to that stream gets better and better, and we can more intelligently and accurately regulate it, — regulate that particular run, as it splits off from the other runs.

"Q. Do you consider it important to have control over any fishing effort which is made upon the stocks at this point in their migration?

LASATER, Redirect

(R.S. 885)

"A. It is important if the stream is going to be held near or at its maximum potential production for endless years to come.

"Q. Now, as I recall yesterday, there was, you testified regarding the chum runs and the fact that they were on a general decline; is that correct?

"A. That is correct.

"Q. Now, I—

"A. I don't know whether they are declining further. They have declined, and they are at a low level.

"Q. Would you consider this—well, let me put it this way; are there natural variations in the total size of the runs for the various specie of salmon which we have here in the Sound area?

"A. There are extreme variations.

"Q. And upon what do you base this opinion, or—.

"A. Well, first of all we have actual records of fluctuations of the runs, but it occurs in this way: If you have a number of factors which can affect a salmon run, and they all work to the favorable side, then you will have a good run.

"If a number of them combined are all to the poor side, then you will have a poorer run. It is rather like a farmer when he plants his seeds; he is hopeful of a crop, but regardless of his best efforts, there is no guarantee that he will get a crop.

LASATER, Redirect

(R.S. 886)

"Q. So that you might say you are the farmer, then, in this situation, and you are attempting to act on the variable factors over which you do have control with regard to the needs, conservation needs of the resource.

"A. It is a rough approximation, except the farmer can see his crop any time, and ours is largely invisible, and on the move. It is quite a bit more difficult.

"Q. Now, have you, yourself, Mr. Lasater, ever made any test regarding the effect of discharge of effluents or wastes upon downstream migrants?

"A. Yes, I have.

"Q. Would you tell us about these tests and what conclusions you could draw from them?

"A. Over a period of years I have tested a number of potential wastes, or pollutions, on young salmon, and one of the remarkable features we found is at the downstream migration stage, they are migrating to the sea, and they are at their most resistant point to death or immobilization due to waste.

"Q. Now, what specie of salmon was this? Is this a Chinook?

"A. Chinooks, silvers, pinks and chums.

LASATER, Redirect

(R.S. 887)

"Q. I see. Now, did these tests, did you ever make any tests with regard to the discharge of any waste materials at the St. Regis Mill which is—I believe we have a map, sir, and we might be able to locate it.

"A. It is near the mouth of the Puyallup.

"MR. CONIFF: For the record, I would like to refer to this exhibit which has been admitted into evidence.

"Q. Could you point out to the Court on what has been admitted into evidence as Plaintiff's Exhibit No. 26 the location of this mill?

"A. Approximately, it is, or the mill is approximately there (indicating). I believe this is the mill.

"Q. Would you mark it on there, please, and initial it?

"A. (Witness complies with request of counsel)

"Q. And what conclusions did you draw from the tests which you conducted on the St. Regis affluents?

"A. That for one thing, that this particular pulp mill is, doesn't have as lethal waste as a number of others throughout the Puget Sound area.

"Q. Why is that, do you know?

"A. It is a type of waste, or it is—they burn, evaporate and burn their, what they call 'cooking liquor,' and recovery their chemicals, and there are a number of other pulp mills which dump their chemicals into the water.

"Q. I see. What conclusions do you draw from the tests which you made of the St. Regis affluents? And by the way, when did you make these tests?

LASTER, Redirect

(R.S. 888)

"A. Oh, these were in the early '50's.

"Q. What conclusions could you draw from them, if any?

"A. Well, we had drawn a precise conclusion as to the dilution that would, the waste that would kill *young salmon. I don't have them with me.*

"Q. Do you of your own knowledge know if St. Regis handles their wastes or their affluents in a manner prescribed by another state agency?

"A. There has been a considerable amount of work done with them by the Pollution Control Commission at the time that I was working, hauling wastes from the mill. They had a reputation of having what was described to be, as a very sloppy in-plant operation, meaning that there were large losses of various cooking chemicals and whatever. It has been brought to my attention that this in-plant operation has been considerably tightened up over the last—

"MR. CONE: I would obect to that, Your Honor, 'it has been brought to my attention' unless this is within the scope of his official duties, that this might have been brought to his attention, that would be the rankest form of hearsay.

"THE COURT: Obection sustained.

"Q. One minor point that was brought out, I believe yesterday, Mr. Lasater, was that concerning, concerning the fact that the steelhead fishermen—I believe you testified that you as a fisherman used salmon eggs bait when you are attempting to fish for steelhead?

LASATER, Redirect

(R.S. 889)

"A. That is true.

"Q. Am I correct in summarizing your other testimony?

"A. (Nods head)

"Q. Where do these salmon eggs come from, if you know?

"A. They come from the commercial carcasses of salmon. They are not completely developed. They could not in any way be fertilized or used for, to produce fish.

"Q. In your opinion, Mr. Lasater, is the Indian fishery in the Commencement Bay and Puyallup area a significant cause for the decline of the salmon stocks of the Puyallup River system?

"A. Yes, it is a significant cause.

"Q. Over and above these other mortality factors?

"A. Yes.

"Q. Taking into account, now, these other mortality factors which you have outlined?

"A. Yes.

"MR. CONIFF: If I may have a moment, Your Honor. I intend to wind up the redirect examination very shortly.

"Q. I believe in your testimony earlier this morning, in response to a question by counsel, you indicated that in your opinion it was necessary to totally prohibit net fishery, of the Indian net fishery up to the town of Puyallup in the Puyallup River. Could you explain your answer a little further?

"A. Well, I wouldn't limit it to the town of Puyallup. The important factor is that the fish at the mouth of the river, and in Commencement Bay, at that point, whether they are numerous or few, are all

that you have to work with to get your spawning stock up the river. And the fish do mill. They are very vulnerable, and if you don't control the fishery absolutely at this point, then all of your other efforts will have been completely in vain. And as the fish do mill, enclosures aren't effective, it has

been our finding in streams throughout the state of similar size, that we have had to shut the net fishery down completely. And the evidence of the effect of such a fishery can be found in the Annual Report records.

"Q. Could you refer to an exhibit number?

"A. (No response)

"MR. CONIFF: May I ask the Clerk to find out the exhibit number of the Washington Fisheries—

"A. It's the 1963 Annual Report.

"Q. 1963 Annual Report?

"A. (No response)

"MR. CONIFF: For the record, it is No. 32.

"Q. Isn't that right?

"A. (No response)

"MR. CONIFF: It is that which has been admitted into evidence as Plaintiff's Exhibit No. 32.

"A. I am referring to the catch of silver salmon by year on Page 166. There is a column on 'Inside Cape Flattery, total inside fishery,' I am going to refer to several cycle years specifically because we mentioned 1960 as being the lowest year on record. The year that produced that run was in 1957 when the total inside catch was 293,949 silver salmon. In

1960, the catch was 103,787 silver salmon.

"Now, in that year, we had almost a complete closure, as I have mentioned, as soon as we could see what the run size was. So that from that low catch and low run there, in 1963 we were able to have a catch of 232,822, showing a recovery from this low point.

"A. (Continuing) If we go to Page 197, the table at the lower right on the catch by the Puyallup Indians, we have a silver salmon catch in 1957 of

7,310; in 1960, our poorest year on record, the catch went up to 10,294. Largely as a direct result of shutting down all-over fisheries for escapement, the Indian catch increased. In 1963 then, total production was only slightly more than it was in 1960. The point is that regulations through the outside fishery on a very poor year has an effect of merely increasing the catch at the mouth of the Puyallup and not the escapement.

"Q. Now, just for clarification, you were using silver statistics, and silvers are a three-year fish, with very little overlap, is that correct?

"A. That is right.

"Q. So that the brood year figures would be pretty accurate, in your opinion?

"A. Yes.

"Q. So that the attempt to regulate other fisheries without regulation of a fishery in the estuaries of the sound, in your opinion, would this be impractical or—

"A. It can be totally ineffective.

"Q. Going back here on Defendant's Exhibit "M" for illustrative purposes, I believe that at this page (indicating) defense counsel wrote 'Except Sport Fishery;' was it your testimony that sport fishery was ineffective or inefficient in Commencement Bay?

"A. It is—

"MR. CONE: Objection; leading.

LASATER, Redirect

(R.S. 893)

"MR. CONIFF: I am merely asking if he recalled what his testimony was.

"THE COURT: Objection will be overruled.

"A. We found it not only here, but at river mouths throughout Puget Sound that the catch of fish as they mature and mill at the river mouth, sports catch, doesn't reflect the numbers.

"For instance, I can recall figures for Elliott

Bay where we had a very large run of Chinook Salmon this past fall, and the sport catch is a few thousand. I can't be precise, but it is a few thousand. The run to the hatchery alone approached 60,000 salmon. This is in the middle of a large city with an extremely heavy effort but a very low catch per fisherman on the peak of the run. The fish are there but they don't bite well.

"Q. So that would it be more accurate in your judgment to be 'Except a sport fishery' and then parenthesis 'relatively inefficient', or what would be appropriate language to put in there?

"A. Well, it says 'No mortality factor allowable except a sport fishery.' The statement is accurate but it would perhaps be more understandable for the Court if there was a sentence or statement that said that the sport fishery is inefficient at the mouth of the river. Now, inefficient in comparison, of course, to net gear or total numbers of fish arriving or in the vicinity of the gear.

"MR. CONIFF: No further questions.

LASATER, Redirect

(R.S. 894)

"RECROSS EXAMINATION

By Mr. Cone:

"Q. I wonder if I might ask you to hand me the 1963 Annual Report, sir.

"A. Can I have it back?

"Q. I am not going to walk off with it.

"A. (Witness hands to counsel) I am not sure what is in evidence or what isn't, and as soon as you fellows have it—

"Q. I promise you I won't even walk as far as the counsel table with it.

"You referred to the total Puyallup catch, and I believe you said it was on 197, is that correct?

"A. I don't remember the page.

"Q. Let me ask you this, sir, you have gone through the fishing regulations of the Puyallup River Tribe,

and do you recall what I am referring to now? I think you have the book up there.

"A. Yes, I have it here.

"Q. You said that portions of these regulations you weren't able to judge because you didn't known how many Puyallup River fishermen there were, is that correct I mean, Puyallup Indians fishing on the Puyallup River?

"A. That is right.

"Q. Now, you didn't mean to indicate, did you, sir, that the persons imposing these regulations or operating them would suffer from the same deficiency? Your observation?

LASATER, Recross

(R.S. 661)

"THE WITNESS: No.

"MR. MCLEOD: Or under your control, these examinations, if any?

"THE WITNESS: Not direct supervision, no.

"MR. MCLEOD: I have no further questions.

"THE COURT: Continue, Mr. Coniff.

"DIRECT EXAMINATIONS (Continued)

By Mr. Coniff:

"Q. Mr. Lasater, I believe you testified before voir dire that one time prior to becoming Assistant Director, you were responsible for the over-all what we might say, management program, in a biological sense, for the Department.

"Would you describe to the Court a little more in detail what were your duties when you were in that capacity?

"A. My duties in general were to be aware of and make recommendations concerning all fisheries, where fish were physically removed from the resource for human consumption, or animal food, or otherwise, either for sport or commercial, and this would include any of the ocean fisheries, Puget Sound Fisheries, or any river fisheries.

"And it was my duty to analyze these fisheries and make recommendations for management of the stocks.

"Q. Well, now, am I correct in assuming, then, that

LASATER, Direct Voir Dire

(R.S. 662)

the—well what type of recommendations would you make for a given run of fish, we will say, that was coming in, and was—how do you determine the size of the run when they commence to come into the Puget Sound area, or return there from a stream of water?

"A. This is going to take a little while. It is quite complicated.

"Q. Take your time.

"A. These—the fishery, of course, varies by the specie. Dr. Donaldson went into quite a bit of, quite a few statements concerning the various species. But the fishery begins on, at least some of the species, on the high seas.

"And the Department of Fisheries does not conduct many tests on the high seas, but the Federal government does. The Fisheries Research Institute of the University of Washington does.

"We have access to Japanese and Russian data. And the first concern is with, of course, with the high seas fishery. It is apparent from the tagging studies fairly immediately that the Japenese high seas salmon fishery was, or has virtually no effect on Washington stocks, since the fish tags in the area of the Japanese fishery were almost never recovered in a Washington stream.

"The Russians don't fish salmon on the high seas.

LASATER, Direct

(R.S. 663)

"By the way, they concur with the United States and Canada that this shouldn't take place. I am referring to high seas fisheries with nets.

"The Japanese fishery takes place far enough

west so that they are not operating on basic Washington stocks.

"So that the Chinook and silver salmon will first appear in the troll fishery and in the sport fishery.

"Q. This is offshore, now, or out of the Sound? We are not fishing—

"A. We are inside fishing, and out of the Sound, both. It is both inside and outside the three-mile limit.

"But west of Capa [sic] Flattery is where they first appear. And most fisheries are limited by season, and by year, and the sport fishery by a bay limit.

"And both fisheries are regulated by size, limits, to protect immature fish.

"The pink salmon, and the sockeye salmon are taken in relatively small numbers by the hook and line fisheries; chum salmon but rarely.

"Q. Why is this, just as a footnote here?

"A. The simplest answer is that they don't bite.

"Q. I see.

"A. This may be changed as—their manner of feeding is such that they eat much smaller organisms than the Chinook and silver salmon do, and don't take the things that are offered to fish.

LASATER, Direct

(R.S. 664)

"Q. Would you continue now with your explanation of the biological considerations that, or the regulation patterns and biological considerations leading to the regulation of the fishery on these?

"A. One more factor on the high seas is that not fishing is illegal in both the United States and Canada by international agreement, and the reason for this is that the principle is clearly established that—

"MR. CONE: Your Honor, I am going to object to his testimony as to the reason behind any official international compact between this country and the Canadians, unless he lays a foundation that he drafted the document, or participated in the drafting of it.

"MR. CONIFF: Your Honor,—

"THE COURT: Objection overruled."

By Mr. Coniff:

"Q. You may continue.

"A. I am familiar with the documents in Washington as well as the other states.

"There is no net fishing on the high seas based on the principle that these are what we would call milling stocks. And with a milling stock that is not migrating to a given point over a given period of time, management becomes very, very difficult, because a week-end closure, or a weekly closure, or some such thing, doesn't work because the fish are continuously available to the fishery.

LASATER, Direct

(R.S. 665)

"In other words, to fish one week, and then close a week, the fish has not escaped the fishery. They are still there when you fish again, and it is simply a matter of getting enough gear out there. The run can be, or the stock can be badly depleted without control, so there is no net fishery as the fish entered the Straits of Juan de Fuca.

"They are migrating, and in late summer—well, part of the stock is sockeye. The sockeye has mostly started in early summer. And various species migrate at various times during the summer, and into the fall.

"But then we have fish that are traveling, going directly to the river mouth, and net fisheries do take place.

"The troll fishery does not come inside. The sport fisheries do continue, and there the gear is regulated by length, and by area that they may fish, and by closures which are put in ahead of the season based upon what knowledge we have, or what expectations we have of the coming run.

"And then there are emergency closures involved in many years because the run, or the fishery developed differently than we thought, and these are imposed for additional protection on the stocks, here, the week-end closures.

"Actually, this is, oh, just a way of speaking, sometimes a fishery may fish one day a week, or two

LASATER, Direct

(R.S. 666)

days a week, on a poor run, but the closures are such on the moving stock that fish do escape the fishery, and move on through on the closures, so that we have both harvest and escapement.

"The fish proceed down Sound through various fishing areas. They are set up in areas so as the fish begin to move to different rivers, their strength of the run, the strength of the runs can be independently assessed, and special closures put in special areas.

"For instance, if Area A has a good run and Area B has a poor run, Area A will have a heavier closure, or more restriction, or perhaps total closure, while the area of the more abundant run is left open as the fish come on through these areas.

"With the various closures, and with the rather constant surveillance of the fishery, lots of emphasis is placed on how many boats are fishing, and what is their catch per landing.

"In other words, the catch per unit of effort.

"If there are, for instance, a lot of boats fishing, and the catch per unit of effort is very low, this tips us off that the run is weak compared with past records, and we may take action.

"If the run is strong, we may take further action

LASATER, Direct

(R.S. 667)

to liberalize the fishing.

"As the fish approach the river mouth they once again slow down, and they will mill at the river mouth, so very nearly every river in the State of Washington has a salmon preserve at its mouth.

"Commencement Bay does, Elliott Bay, and a number of streams.

"The salmon are milling and delaying, and es-

pecially in times of low water or early arrival of the run or for any number of reasons, the delay may be considerable.

"Once again the fish are available to the net again and again. This is the main reason for the preserve, so that the milling stock will not be completely taken.

"Them [sic] further, this is a point in the bay at the river mouth where you very definitely have a funnelling effect. The entire run is funneled into a smaller area and it is very vulnerable.

"A limited amount of effort right at the river mouth may take a considerable segment of a run.

"Q. Now, Mr. Lasater, what do you consider to be the necessary or proper environment, fresh water environment, for the production of salmon?

"A. They should have free acess, or a free area of movement in the river. They should have copious quantities of gravel, without a great deal or what I call fines [sic], mud and sand.

LASATER, Direct

(R.S. 668)

"The water temperatures should be cool, and for many species it is important that summer temperatures be low and river flows relatively high, plenty of water through the summer months.

"Q. Would you consider the Puyallup River system to meet these requirements, or these environmental requirements?

"A. The Puyallup River is a fine salmon stream. The Puyallup River and its tributaries are good salmon producers, good environmental habitat.

"Q. Now, Mr. Lasater, I ask you to assume that there is a complex of gear, fishing gear, roughly to size, as portrayed on plaintiff's Exhibit No. 26, and I ask you to assume that this gear is in almost continuous operation at the mouth of the Puyallup River where it comes into Commencement Bay, and I would ask you further to assume that this gear is made up of not only gill nets but mono-

filiament nets. I ask you further to assume that this gear is in operation seven days a week, twenty-four hours a day, during the peek of the runs of the various species of fish which inhabit the Puyallup River system, and I ask you to further assume that further upstream above the net complex portrayed on plaintiff's Exhibit No. 26 that there are a series of set nets of varying lengths and varying construction, draped and set up on the sides of the banks, or set from various bridges which cross

LASATER, Direct

(R.S. 669)

the river above the mouth of the stream, the river; I ask you to further assume that during certain portions of each week a drift net fishery is in operation, and that this drift net fishery is operated in such a manner as to virtually block or sweep the river of all fish.

"Now I would ask you, do you have an opinion regarding the effect of such a fishery upon the salmon stock of the Puyallup River system? A yes or no answer.

"MR. CONE: Just a minute.

"Your Honor: especially with such an elaborate hypothetical, I am loath to object, but, number one, he is asking the Doctor to assume the complex of nets is—and I hope I am quoting it correctly—of the size indicated on the map.

"Now, every witness who has gone there has said no, no, this is not to scale, because that indicates single nets 900 yeards long.

"Now, number two, he is talking about monofilament, and there is not in evidence at this point any evidence that that fishery, specifically the complex that he is indicating, contains any monofilament.

"Now, there are other things there which are not in evidence in the hypothetical, but, respectfully, I think we should use that for starters.

LASATER, Direct

(R.S. 670)

"MR. CONIFF: Well, your Honor, I could take it point by point if you so desire.

"THE COURT: Well, I think the point is well taken, based upon the fact that the diagrams as made by the witness on the map are certainly not to scale, and I do think that you have added some points here that are not sustained by the evidence yet, at least.

"For example, your use of the word of virtually sweeping the rivers free of fish. I don't find any evidence to that effect; yet, anyway.

"I am going to allow you to reconstruct your hypothetical question, and I am going to take a recess at this time.

"I would like to ask Counsel to meet me in Chambers, please.

LASATER, Direct

(R.S. 671)

—By Mr. Coniff (Direct Examination Cont'd)

"Q. Mr. Lasater, before we try to develop your opinion on the effect of the fishery, if any, in the Puyallup River, I would like to take a couple of steps back over some of the points you raised in your other testimony, particularly on the voir dire examination. To your knowledge—well, how does the, or how do you as a biologist, or how does the Department of Fisheries take into account in their setting the regulations and so on the effects on the mortality, mortalities from all causes, on the fish population, of fish stocks under your jurisdiction, salmon in this case?

"A. The problem of mortalities—I think that if you would remember back to Dr. Donaldson's testimony, that he pointed out that basically for every two fish that spawn, you need two back, and there is a variation of mortalities in between. And the basic thing is if the mortality rate from any number of causes is affecting your stock, whether it be straightening of the river channel, or pollution, or

bad logging practices, or whatever, this will, can be expected to increase the mortality rate on the fish prior to them coming back to the spawning stream, and perhaps after they return.

"And allowing for this, you assure that the spawning escapement gets to the spawning grounds. In fact, if you have to allow for these allowances, you have to take it out of the heart because if you don't, then you not only have detrimental environmental factors operating, you also have even less fish, because you have not filled

LASATER, Direct by Coniff

(R.S. 672)

the spawning grounds. You are working two important things at the same time if you do otherwise.

"Q. In other words, these other mortality factors in the total life cycle of our fish stocks, and salmon stocks, are adjusted, so to speak, by the setting of the, by the regulations concerning the harvest of these fish?

"A. Two things; you try to correct the cause, and if you can't correct the cause, then you allow for its effect.

"MR. MCLEOD: What was that last statement?

"THE WITNESS: If you do two things in the mortality problems, you try to correct the cause.

"MR. MCLEOD: Yes, but what was that last statement that you made?

"THE WITNESS: If you can't correct the cause, then you must allow for its effect.

"Q. Now, directing you attention to the Commencement Bay area, and the Puyallup River, I believe there has been testimony that there is an area that is closed to commercial fishing; what about sports fishing for salmon?

"A. Sports fishing is allowed in the bay.

"One thing that has become quite well known with the sports fishery, and that is, especially after the fish have finished their migration through the sound and they are milling near the river mouth

and maturing, they cease feeding and they don't strike very well, so the hook and line fishery will take but a small percentage of the available stock no matter how hard they fish.

LASATER—Direct by Conniff

(R.S. 673)

"And the river itself, we had a sports fishery on the river in past years, limited in area, and then further limited in time, and then as our dissatisfaction with spawning escapements increased, at our last regulation hearing we closed the Puyallup River to all sports fishery for salmon, except for what we call 'jacks.' And the jacks are the precocious males that contribute very little to the spawning ground. There are no female jacks, and they can be differentiated by size since they are much longer than the other fish.

"Q. Perhaps you should explain at this point, what is a jack salmon, and whether it is a two-year fish, three-year fish, or what?

"A. It depends on the specie. 'Jack' can refer to any specie. It is a salmon that matures a year prior to normal. For instance, fall Chinook normally mature as two, three and four-year-old fish. The jacks mature as two-year-old fish, and they are almost 100 per cent males. So they are small males because they are younger.

"A silver salmon matures almost entirely at three years of age. Jack silvers are two years of age. And these jack silvers are usually around, oh, twelve to eighteen inches long, maximum weight probably four and a half pounds, where the three-year-old fish largely run from five to twenty pounds.

"Q. Now, we will make another try at the hypothetical

LASATER—Direct by Coniff

(R.S. 674)

question. Mr. Lasater, have you—first, have you observed a complex of nets operated by Indians at, in or about the mouth of the Puyallup River?

"A. I have observed the nets.

"Q. When did you observe them?

"A. In the fall of 1963 when I flew over the bay.

"Q. And about—could you describe these nets to the Court as to what you observed, and then how long they were?

"A. They were, when I flew over the bay, there were a great many nets in the bay. I was flying at an altitude of approximately two to three hundred feet, and the nets, the longer nets looked to be, oh, to me, a thousand feet long. Some of them were—it's hard to tell one net from another net when they are attached together because there are various wings, and other nets attached at angles to the main net.

"The thing that impressed me was that they quite well encompassed the mouth of the Puyallup River.

"Q. Do you mean they went all the way across the mouth?

"A. I couldn't see if the nets were completely across the mouth. The nets were clustered about the mouth of the river, and in such a way that I would expect any fish entering the mouth of the Puyallup would have plenty of opportunity to contact these nets.

"Q. Now, would you assume, Mr. Lasater, that these nets that you saw at the mouth of the river are in operation during the times that the various anadromous fish stocks are returning to their spawning grounds in the Puyallup system, and that this

net complex, these nets are left in position capable of, left in this position and in operable condition for twenty-four hours a day during this time?

"A. I based my answer on talking to numerous members of our staff who have observed the nets from time to time, and it is my understanding from the record given here, and talking to our staff, that

nets, such as the group at the mouth of the river, are seldom removed, that they are there most of the time.

"MR. CONE: Your Honor, I move that—wait just a minute. I will move to strike this understanding based upon various hearsay conduits, and what his understanding of the 'record' given here.

"Now, he can answer the question based upon his personal knowledge of the hypothetical state of facts, or the data of which he has personal knowledge, but I think that any attempt to instruct an understanding with the record made this far here, other than of the various reports, would be inadmissible.

"THE COURT: The voluntary statement will be stricken. Just wait, Mr. Lasater, until the hypothetical question has been completed, if you will, please.

"Q. Now, Mr. Lasater, would you assume that the nets which you observed were, are in operation twenty-four hours a day, during the times when the various stocks of fish are arriving at the mouth of the river on their way to the spawning grounds; would you further assume Mr. Lasater, that there are

(R.S. 676)

at various other locations along the banks of the river other set nets of varying lengths of, say, of varying lengths from 30 to 40 feet long, and varying in numbers, in terms of locations of ten to twenty; now assuming this set of facts, Mr. Lasater, do you have an opinion as to the effect of such a fishery upon the anadromous fish population of the Puyallup River?

"A. Yes.

"THE WITNESS: Your Honor, may I say something?

"THE COURT: You just said 'yes.' Now that is the first answer.

"THE WITNESS: I am not trying to answer, when he said 'would you assume,' and I answered before, I thought I had a question and not a hypothetical.

"Q. Go ahead.

"MR. MCLEOD: I would like to object for, to this witness's answer on the basis that he hasn't shown any qualifications to answer this particular question, because he hasn't personally observed the facts of the data that he is testifying on. He hasn't considered all of the factors involved.

"He said that his hypothetical question, and the answer to it, or he said yes, but by his own statement he has not made sufficient tests, or sufficient personal observations to place it within his own knowledge, the factors upon which he is going to testify, and the factors involved in the expert opinion he is going to express.

LASATER, Direct by Coniff

(R.S. 677)

"And I also would like to object on the further ground that the hypothetical question is inadmissible in a sense that it isn't, it doesn't properly describe the evidence that is in the record.

"THE COURT: Objection will be overruled. The answer is yes, he has an opinion. You may continue.

"Q. What is that opinion?

"A. (No response.)

"Q. Would you tell us what it is?

"A. Well, it will take some explanation. I would like to make, to bring some background into it in that there is a wide basis of written statements on the effect of unregulated fishing on a number of fisheries.

"MR. MCLEOD: I will object to this answer as being non-responsive, and I will move that it be stricken.

"THE COURT: Objection will be overruled. I think he is entitled to give his reasons for, and background of the opinion.

"MR. MCLEOD: Well, I would like to move to strike the answer on the basis of it being from hearsay data and not within his personal knowledge, nor not within his personal supervision or control.

"THE COURT: Objection will be overruled. I take

it he is testifying as an expert based upon study and experience both.

"A. I would, a point of my study would refer to the F.A.O. document of the United Nations conference

LASATER, Direct by Coniff

(R.S. 678)

called a 'World Conference' on the effect of regulation on economics, fishing regulation on economics.

"There, aside from the strictly biological problem we have, are the, and the occasional point, is the general principle that an unregulated fishery will do either or both of two things; that it will expand to the point that the stock is depleted, then the fishery will drop off to a point where it barely exists at sufficient strength to hold the stock of fish at a low level.

"The other effect is that yearly it will multiply the number of fishermen, or the number of net efforts will multiply to the point where the catch is divided among so many individuals that very little profit is made by anyone, then the fishery will then fall off.

"As regards to the Puyallup River itself, this and other readings and other studies would lead me to believe that efforts alone, increased efforts alone for a time will hold the catch at a fairly high level, while the escapement will decline; then the stocks will subsequently decline, and then the catch must fall off. And I would expect that the unregulated fishery would then remain at a low level until some major factor changed.

LASATER, Direct by Coniff

(R.S. 679)

"MR. MCLEOD: If you Honor please, I would like to move to strike all this witness's testimony as an expert on this subject on the grounds previously stated.

"THE COURT: Motion will be denied.

By Mr. Coniff:

"Q. Now, Mr. Lasater, I believe you mentioned in your answer that the escapement had been declining, is that correct?

"A. Yes.

"MR. MCLEOD: I will object to this question and move the answer be stricken.

"Counsel is obviously leading the witness and telling him what to say.

"THE COURT: I will sustain the objection to the form of the question in this instance.

"Q. Have you with you, Mr. Lasater, any data which would reflect the escapement of anadromous fish over the past few years into the Puyallup River system?

"A. Yes, I have.

"Q. May I have it, please?

"A. I would refer to a record of our hatchery count, and to the Annual Report.

"Q. And is the page marked here (indicating)?

"A. That is a different page.

"Q. Would you mark the page then?

"A. All right.

"Q. Which has these figures?

"A. (Witness complies.)

LASATER, Direct

(R.S. 680)

"Q. Mr. Coniff, on marking the page with a marker—

"MR. MCLEOD: What are you looking at?

"THE WITNESS: I am looking at the year 1963, 73rd Annual Report of the Washington Department of Fisheries.

"MR. MCLEOD: Could we have a copy of it, please, to look at?

"MR. KNODEL: We have a copy, your Honor.

"MR. MCLEOD: You have an extra copy to look at?

"MR. KNODEL: (Hands to Counsel.)

"MR. CONIFF: If I may have a moment, you Honor,

we will try to provide Counsel with additional copies of this data.

"Now, I would like to have this marked for identification, if I may.

(Whereupon, Plaintiff's Exhibit Number 31 was marked for identification.)

By Mr. Coniff:

"Q. I am now handing you what has been marked for identification as Plaintiff's Exhibit No. 31, and I will ask you to tell the Court what that is.

"A. May I have another marker for this page?

"Q. (Counsel hands to witness.)

"A. This is a record of the total adult salmon arriving at the Puyallup hatchery with a segregation of those spawned artificially and those permitted to spawn naturally, but it is a record of the run arriving to the Puyallup hatchery.

LASATER, Direct

(R.S. 681)

"Q. I see. And looking at what has been admitted into evidence as Plaintiff's Exhibit No. 14, would you please point out to the Court where that hatchery is located on this illustrative map?

"A. (Witness leaves witness stand.)

"The hatchery is here above Orting on the tributary of the Carbon on Voits Creek (indicating).

(Witness resumes witness stand.)

"Q. Now, is this data a part of the—well, you might call it official or regularly kept statistics or records of the Department?

"A. Yes, it is.

"Q. This is a copy made from these statistics of the Department?

"A. Yes.

"MR. CONIFF: I would like to now move for the introduction of what has been marked for identification as Plaintiff's Exhibit Number 31.

"MR. MCLEOD: What is the materiality of this?

"MR. CONIFF: This is to show the declining es-

capement of the anadromous fish, in so far as the hatchery operation is concerned, the Puyallup River.

"It certainly has a major bearing on the over-all conservation issues in this lawsuit.

"MR. MCLEOD: These are the same ones that are

LASATER, Direct

(R.S. 682)

published in your—

"THE WITNESS: This a more detailed breakdown than you will find in this volume (indicating).

"MR. MCLEOD: Are you putting them both in?

"MR. CONIFF: Yes, I was intending to have marked for identification and offered into evidence the particular page of the 73rd Annual Report of the Department of Fisheries which would show the total escapement of all fish, anadromous fish, into the Puyallup system.

"MR. MCLEOD: What page is this particular data on?

"THE WITNESS: I was going to use several pages.

"On page 102 is escapement, adult escapement to hatchery racks, silver salmon; and there is a table of this on page 102. Chinook salmon, the same thing on page 100.

"Then chum salmon, same record, page 104.

"Further, I intended to refer to the catch of salmon by the Muckleshoot Indians on the Reservation, that reservation as marked on the White River (indicating), as an index to fish coming up that stream, which is on page 197, and the counts of salmon hauled above Mud Mountain Dam, which is also on the White River and is marked on that chart (indicating).

"Q. Would you give us the page number on the Mud Mountain Dam—

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(R.S. 683)

"A. That is 210.

"MR. CONIFF: If I may have this document, then I will have it marked for identification.

(Whereupon, Plaintiff's Exhibit Number 32 was marked for identification.)

"MR. CONE: No objection, your Honor.

"MR. CONIFF: I move the admission, then of what has been marked for identification as Plaintiff's Exhibit Number 32, and the particular pages which the witness referred to.

"MR. CONE: No objection.

"MR. MCLEOD: No objection.

"THE COURT: It will be admitted as Plaintiff's No. 32.

(Whereupon, Plaintiff's Exhibit No. 32 for identification was admitted in evidence.)

"Q. Now, Mr. Lasater, is this data which you have referred to now and identified of any significance to you as a biologist?

"A. Yes, it is.

"Q. Would you explain of what significance this data is?

"A. In at least two ways: one, based on experience at other hatcheries on Puget Sound with these stocks, it was our expectation to be able to increase the run of salmon to the Puyallup River through operations of this hatchery, and it has not lived up

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(R.S. 684)

to its expectations in this regard.

"Further, the record of salmon arriving back at the hatchery is an index to the escapement to the Puyallup River of these species.

"Q. I see. Is there any trend established that you can tell from these figures that in your opinion as a biologist would be significant?

"A. Yes. The total run to the rack built up for a time, and then went into a rather extensive and serious decline.

"Q. About when did this occur, begin to occur?

"A. Runs vary, of course, but in 1952, for instance, a total of 6,739 salmon arrived at the rack; '53, 4,900

approximately, '54, 4,700; '55, 2,600; 1956, 3,300; 1957, 2,400; 1958, 1,200; 1959, 2,100; 1960, 1,400; 1961, 1,200; 1962, 947; 1963, 733; 1964, a considerable rise, with 7,000.

"Q. How would you explain the rise in 1964, or can you?

"A. This fishing at the mouth of the river and in the lower river was considerably curtailed in 1964.

"Q. Now, if you refer to the annual report that has been admitted in evidence as Plaintiff's Exhibit Number 32, will you explain to the Court the significance, if any, of the data on the pages you mentioned in your identification of this document?

"A. The pages on hatchery escapements of the various species is a breakdown of the totals that I men-

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(R.S. 685)

tioned here (indicating), and, therefore, these two are complementary, and I would let that go if that is—

"Q. Fine.

"A. On page 197 the take by the Muckleshoot Indians on the White River in the 1940's varied between two and three thousand fish; reached an exceptional high in 1949, I believe, of nearly 20,000; then dropped back to the two to four thousand level, and then down to—I will go through some figures:

"1958, 1,800; 1959, 1,600—

"MR. MCLEOD: Just a second.

"Are you reading that from the report?

"THE WITNESS: I am on page—

"MR. MCLEOD: That is the best evidence of this.

"MR. CONIFF: For purposes of explaining, I would presume he could read from the document.

"THE COURT: Well, I think it would be helpful to me in any event, so I will overrule the objection.

By Mr. Coniff:

"Q. You may continue.

"A. (Continuing) 1960, 1,700; 1961, 3,800; 1962, 2,300; 1963, 724.

"Now, this must be tied to the Mud Mountain Dam escapements, since the fish that go by the Muckleshoot Reservation are hauled around Mud

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(R.S. 686)

Mountain Dam so that they may spawn.

"Q. I see. Now, before you go into the Mud Mountain Dam count, looking at Plaintiff's Exhibit Number 14, is Mud Mountain Dam shown on there?

"A. Yes, it is.

"Q. And it is shown where?

"A. It is shown upstream, or to the right of the Muckleshoot Indian Reservation, the section labeled as White River.

"There is a red mark for the dam, and a blue arrow showing the reservoir.

"Q. All right, you may continue.

"A. Mud Mountain trap count on total fish starts in 1940, and the dam did cause us some trouble at that time, and the counts shown here, the counts start low.

"In the 1940's the counts started at, well, in 1940 at 111; the next year, 1941, 1,500; moved up into the five to 7,000 bracket, and in 1950 reached a total of 15,653 salmon past Mud Mountain.

"MR. MCLEOD: Th e are all figures for fish hauled around Mud Mountain Dam?

"THE WITNESS: That is right.

"A. (Continuing) the last figure, where the catch was above 7,000, is in 1954.

"The number hauled around Mud Mountain since that time has ranged lower, and since 1957 has not reached 3,000 fish.

LASATER, Direct

(R.S. 687)

"Q. Now, do you consider this significant, a significant decline?

"A. Yes, I do, when it is compared with the Puyallup Indian catch as shown on page 197.

"Q. I see. Now, one further clarification question, Mr. Lasater.

"Referring again to Plaintiff's Exhibit Number 14, I gather from the fact that these fish are trucked around the dam that it must mean that there is some spawning area above Mud Mountain Dam, is that correct?

"A. Yes. The significance of the other figures there, declining, I believe can be found, since I was using total catches, on page 197, on the records of the Puyallup Indian catch, which start in 1953 at 106; 1954, 3,210—.

"MR. MCLEOD: Just a second. Now, where is this?

"THE WITNESS: This is page 197. The bottom right-hand table.

"MR. MCLEOD: And what is the title of it?

"THE WITNESS: Puyallup Indian, Puyallup River, Numbers of Fish Taken by Gillnets and Set Nets.

"MR. MCLEOD: That ranges from 1935 through 1963, is that correct?

"THE WITNESS: No, no. On the left is the Nisqually table, and it ranges from 1953 to 1963.

(R.S. 688)

"Just the lower right-hand table.

"MR. MCLEOD: Why didn't you include from 1935 there?

"THE WITNESS: I understand there was no commercial fishery on that river in those years.

"MR. MCLEOD: Well, you should still have escapement figures, shouldn't you?

"MR. CONIFF: Your Honor,—

"THE WITNESS: This is not escapement here, this is catch.

"MR. CONIFF:—I would presume Counsel could clarify on cross examination any questions he might have.

"THE COURT: He is talking about catch.

"MR. MCLEOD: He is going so fast I can't keep up with him, though.

"THE COURT: All right, continue.

"MR. MCLEOD: Excuse me. Could I ask just one question on this chart?

"Is this taking into consideration the Muckleshoot fishery on the White River?

"THE WITNESS: I have just been through that.

"MR. MCLEOD: Yes, but these figures that you have here, that's just the Puyallup fish?

"THE WITNESS: That is right.

"MR. MCLEOD: You are not considering the —

"THE WITNESS: They are not a part of this. Is that the question?

(R.S. 689)

"MR. MCLEOD: Yes, the Muckleshoot catch is not included in here?

"THE WITNESS: No.

"MR. MCLEOD: It is separate?

"THE WITNESS: It is separate, and the table just above it on the same page is the Muckleshoot catch.

By Mr. Coniff:

"Q. Would you read the captions on the tables?

"That may clarify the situation on the respective tables.

"A. The tables that I am referring to on page 197, the first that I have gone to is on the top right-hand side of the page, and it is entitled "Muckleshoot Indians, White River, Numbers of Fish Taken by Set Nets, Spears and Dipnets."

"Directly below that is the next table I am referring to labeled, 'Puyallup Indians, Puyallup River, Numbers of Fish Taken by Gillnets and Set Nets.'

(R.S. 690)

"MR. CONIFF: Is the situation clarified now, Counsel?

"MR. MCLEOD: As far as coming from him, as far as possible, coming from him.

"Q. Now, would you continue then? Would you explain to the Court the significance that these, of the data that is contained on these tables?

"A. The significance is that I have gone through three counts where the runs to the, or catches to the various areas were declining. Now, I will read the total salmon catches by the Puyallup Indians from 1953 through 1963. 1953, 176; 1954, 3,210; 1955, 1,638; 1956, 5,904; 1957, 12,417; 1958, 14,901; 1959, 17,004; 1960, 15,740; 1961, 46,778; 1962, 33,676; 1963, 75,092.

"I relate the decline in the other counts to the increase in this catch.

"MR. MCLEOD: In what?

"THE WITNESS: I relate the decline in the other counts given to the increase in the catch by the Puyallups at the mouth of the river.

"Q. Now, I believe—

"MR. MCLEOD: I will object to this answer, and move that it be stricken on the grounds that this witness is not, has not shown the qualifications, or that he has made these records, or that he has sufficient background to testify, or make the analysis that he is making of these records, because he has failed to consider other factors in the decline in the fish runs that are very significant, and I believe that

LASATER, Direct by Coniff

(R.S. 691)

we will show are more destructive to the run than anything that the Indians could have done at any time.

"THE COURT: The motion and objection will be denied.

"Q. Mr. Lasater, have you visited the various spawning areas of the Puyallup River?

"A. Not all.

"Q. But you have visited some of them?

"A. Yes.

"Q. Would you classify that these areas were good spawning areas for the various specie of salmon which are indigenous to this river system?

"A. The river, of course, varies, but much of the Puyallup system is good spawning because of cool water, and the copious amounts of clean gravel.

"Q. In you opinion, do you believe, based on your observations of the spawning areas, do you believe that the spawning areas are being utilized to the capacity over the past few years in view of the escapement counts you have referred to?

"A. I would hesitate to reply to this. I am not as well qualified as some others.

"I was more of a crew member on the spawning ground count.

"I would say that, from what I saw, the grounds could accommodate more spawning.

"Q. That is all I wanted.

"MR CONIFF: No further questions of this witness.

LASATER, Direct by Coniff

(R.S. 1022)

JAMES A. HAMILTON'S TESTIMONY (R.S. 1022-1040)

JAMES ARTHUR HAMILTON, called as a witness by and on behalf of the Plaintiffs, having been first duly sworn, was examined and testified as follows:

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you please state your name and address?

"A. My name is James Arthur Hamilton, 10345 Homestead Lane, Beaverton, Oregon.

"Q. Who are you presently employed by?

"A. I am employed by Pacific Power & Light Company as their fishery biologist.

"THE COURT: Fishery what?

"THE WITNESS: Fishery biologist.

"MR. CONE: Dr. Hamilton, when you speak rapidly it is very difficult to—for me to catch everything that you say. So might I just ask as a courtesy that you try to slow down?

"THE WITNESS: I will be glad to do so.

By Mr. Coniff:

"Q. Are you appearing here today in any—on your employer's behalf in any capacity?

"A. I am not.

"Q. Could you tell the Court, please, your educational background?

"A. My undergraduate work at the University was carried on in Biology at the University of British Columbia from 1939 to 1943.

"I received by Bachelor's degree in 1944.

HAMILTON, Direct

(R.S. 1023)

"Following that I did postgraduate work in Zoology, Chemistry, at the University of British Columbia, and received my Master's degree in 1947.

"I then went on and took further post-graduate work at the Univeristy of Washington and received my Doctorate in Zoology and Fisheries at the University of Washington in 1955.

"Q. What has been your professional experience prior to the time you became employed by Pacific Power and Light Company?

"A. I was employed part-time in 1941 to 1942 by the International Pacific Salmon Fisheries Commission.

"I did summer work while attending the University of British Columbia, at which time I carried on tagging studies in the Straits of Georgia on Sockeye salmon.

"I also carried on some tagging studies at the traps on the southern tips of Vancouver Island, and that was done in 1942.

"Following my work at the University, I then

went to the International Salmon Commission as a permanent employee, remained with them until 1956.

"My earlier work with the Salmon Commission involved population enumerations in various streams, for which I was responsible for the enumeration.

"I also spent a considerable amount of time on ratio studies, dealing principally with meristic

(R.S. 1024)

characters, studies of scales, studies with scales for purposes of identifying the various races of Sockeye in the Fraser River, which would be ultimately used for identification of the various races as they pass through the commercial fishery which would ultimately be necessary and/or desirable for regulation purposes.

"Also my work with the Salmon Commission involved studies of the environments, particularly the temperature environment as it relates to the production of Sockeye salmon population to try to evaluate what the controlling factors were in reproduction of Sockeye salmon.

"Also, part of my studies involved work at the Baker Dam—on the Baker River in Washington, studies that were designed to determine the effects of the power project on downstream migrants.

"Q. I see. How, Doctor, could you describe the life cycle of the anadromous fish or salmon—salmon, for example?

"A. I am sure you are primarily interested in the life cycle of the salmon in the Puyallup River.

"There are four species of salmon in the Puyallup, as has already been brought out here: the Chinook, Silvers, the Chum and the Pink salmon.

"Parts of their life history are quite similar; other parts are quite divergent.

"Al species deposit their eggs in the gravel where the eggs remain from the fall or winter, when-

(R.S. 1025)

ever they deposit them, through to the emergent period.

"After hatching, the young alevins remain in the gravel, using up the yolk sac, which is stored, or the yolk, I should say, which is stored in the yolk sac.

"After this is absorbed or partly absorbed the fish emerge from the gravel and then are known as fry. This is where the divergence occurs in some cases.

"Pink Salmon and Chum Salmon fry leave the gravel and move directly to sea. There is very, very little, if any, fresh-water rearing, as we call it. They move directly to sea.

"Now we come to the next form, which is the Chinook salmon, and the Chinook salmon in the Puyallup River is primarily, I think, what we would call the fall variety, fall race.

"They tend to remain in fresh water a little longer, emerge in the spring. They will migrate downstream at a slower pace, you might say, and remain in the fresh water feeding a little longer than the Pink salmon and the Chum salmon.

"There is some evidence that some Chinook will remain for extended periods of time, several months before they actually reach the salt water. It causes some question as to just what they do when they do arrive at salt water.

"There is some indication that they will tend

(R.S. 1026)

to hold up down for a considerable length of time.

"MR. CONE: You dropped your voice at the end the sentence. I didn't catch it.

"THE WITNESS: What was that again?

"MR. CONE: You dropped your voice at the end of the last sentence and I couldn't catch it. I am very sorry.

"A. I think my last sentence covered this particular

point, and it was to this effect, that there is some question as to how long the Chinook salmon actually remain in the estuary waters. There is some indication they may remain for an, for extended periods of time.

"Now we come to the Silver Salmon or Cohoe Salmon. They, unlike the previous three, do remain in fresh water for about a year, and at the smolting stage, at which time the fish are probably a hundred to 120 millimeters, at that stage again in the spring they migrate to the sea.

"Now, as far as the adults are concerned, there is a certain amount of dissimilarity between the species.

"The Pink salmon, as you know, return as two year-old adults, and also it is interesting to know that in this part of the country the run is almost entirely on an odd-year run.

"We see very few years on the other years, unlike Alaska and Northern British Columbia.

HAMILTON, Direct

(R.S. 1027)

"Now, the Chum salmon mature in three and four years and return at that stage.

"The Chinook salmon mature and return at ages anywhere from two, usually five, and occasionally I think they might find a six-year-old even in the Puyallup River.

"As far as the Silvers are concerned, they return as two and three-year-olds.

"When they return as two-year-olds, they call them Jacks. A three-year-old is a normal age of Silvers in this part of the country.

HAMILTON, Direct

(R.S. 1028)

"Q. Now, could you describe the Puyallup River, Doctor, in terms of anadromous or salmon production, the salmon indigenous to that system?

"A. Well, in answering that question you have to consider several different things, and if I could refer to this map over here (indicating)—

"Q. Yes.

"A. (Continuing)—showing the spawning areas.

"Q. Yes. That is Plaintiff's Exhibit No. 14.

"A. (Witness leaves witness stand.) You find here, and I have to look at this very closely, you find here that the Chinooks in the system are found in the Puyallup River, also in Voight's Creek, in the Carbon River, although I understand that as far as the Carbon River is concerned there's some difficulty in observing fish because of the transparency of the water, and South Prairie Creek is apparently very readily observable, and is an important producer of Chinook salmon. I did observe South Prairie Creek myself last month. Of course, there were no spawners at that time, but I had an opportunity to look at the stream at various locations, and in my experience it did appear like a good Chinook stream. Then, of course, we have the Chinooks going up the White River, where they are counted at the Mud Mountain Reservoir, or Mud Mountain Dam.

"The silver salmon tend to be distributed and found in more of the smaller streams. This is a natural characteristic of the silvers. We find that

in Oregon, Washington, British Columbia. They tend to inhabit the smaller tributaries; seldom found in the very big streams. The South Prairie Creek, as indicated here, is a producer of silvers, as is a considerable number of tributaries up above the Mud Mountain, and also the Puyallup, as to silvers and some of these smaller tributaries such as Clear Creek and Kelly Creek, and Voight Creek too is a producer of silver salmon.

"Now, as far as the pinks are concerned, the pinks are found in South Prairie Creek, which is somewhat of the type of stream that you would expect to find pinks, although from my experience you do find pinks in some of the larger streams, unlike silvers. Then there is an indication that

pinks will spawn in the Puyallup as well. This map, of course, I would think limits the extent of the spawning areas. I would expect there are a considerable numbers of small tributaries which would also contain silvers, and to some extent pink salmon. When I was up at Clear Creek I did observe chum salmon spawning at that time, and that was in late January, which shows the late spawning very characteristic of that particular species.

"Now, I said that I needed to refer to several things in considering this matter of the Puyallup River, or Puyallup system, as a salmon producer, and might I refer to these (indicating)?

"Q. Yes, Doctor.

HAMILTON, Direct

(R.S. 1030)

"A. In the consideration of a system as a production area we have to take into consideration the history as we know it, we have to take into consideration the total catch, and here we find that the Puyallup as far as the Chinook are concerned will produce significant numbers of fish, has produced significant numbers of fish, which is certainly indicative of not necessarily its potential but what it is doing right now, and in the case of the Puyallup, as we can see from this graph, it is significant.

"The same thing applies to the silver salmon. We find that as far as the silver salmon is concerned for the White River, referring to the escapements here in the early years, that this was quite a productive area, producing significant numbers of fish. Now, remember that this is only one area in the whole Puyallup, just one tributary, and it is reasonable to expect that the rest of the Puyallup is doing somewhat the same thing, and this is a little deceiving in that we are only talking about one single tributary out of the whole system, and here we are talking about you might say the whole system. This is indicative of the capacity,

or not necessarily the capacity but indicative of what the river is actually doing right now, and it is doing considerably when you consider the numbers of fish that are involved in these catches. (Witness resumes witness stand.)

"Q. Now, Doctor, if this catch were to continue, what do you think would happen eventually to the runs of silver salmon, for example, in the Puyallup system?

HAMILTON, Direct

(R.S. 1031)

"MR. CONE: Just a moment.

"Your Honor, I would object to the expression of an opinion as to this river until he establishes that this particular gentleman has an expert knowledge as to this particular river. I think he is undoubtedly qualified to testify in the abstract or in the hypothetical as to what generally might happen, but as to this particular river, I don't believe he has laid a foundation, Your Honor.

"THE COURT: I am going to overrule the objection because I do think he is qualified to answer as to any river, based upon his studies, but if counsel wanted to pursue a particular river, he may do so.

"MR. CONIFF: Yes.

"MR. MCLEOD: Excuse me. I would like to state another objection for the record.

"There has been no showing that this particular individual has any data or made any tests or studies of this particular river on which he could base any expert opinion.

"THE COURT: Your objection will be noted.

"MR. MCLEOD: And I would like to move to strike all his testimony on that ground.

"THE COURT: It will be denied. You may have a continuing objection.

"Q. Dr. Hamilton, have you visited the Puyallup River and examined it with the view toward—have you visited the Puyallup River and examined it?

HAMILTON, Direct

(R.S. 1032)

"A. I did make a trip to the Puyallup River, and I believe it was on January 30th, it was a Saturday, and did observe some of these streams. Also I went down to the mouth and did observe the general fishing area, too.

"Q. Now, Doctor, have you reviewed data pertinent to the Puyallup River—

"A. Yes.

"Q. (Continuing)—in terms of salmon production?

"A. I have quite independent to the graphs that are prepared here prepared my own, or arranged, I might put it that way, my own data taken from the Washington Department of Fisheries Reports.

"Q. I see. Now, Doctor, I now ask you again, could you give us your opinion as to what you would expect to happen to the silver salmon in the Puyallup system, taking into account the catches which are shown on Plaintiff's Exhibit No. 33?

"A. (Witness leaves witness stand.) Well, recognizing that this is the escapement, only one tributary, namely the White River, and that this is the catch, we will say, of this year (indicating), now, to do this properly you should relate the escapements separately. The escapement here (indicating), it is very apparent that the escapements (indicating) are significantly larger than those at this point (indicating), and I would be inclined to say that the escapements in the river in general, if we were able to show all those escapements for all the tributaries, which show the downward trend like this (indicating).

HAMILTON—Direct

(R.S. 1033)

"Now, you might say, or some might say, that, well, everything looks very nice here, everything is building up, but the thing is that what is building up is the catch is causing this build-up, not the escapement, and if I was responsible for this particular river, if I can put it this way, I would

be alarmed at a condition of this sort. I would be inclined to feel that it was only a matter of time before this whole trend started to show downward. (Witness resumes witness stand.)

"Q. Do you know of any other river system where this downward trend has occurred?

HAMILTON, Direct

(R.S. 1034)

"A. Yes, then I could refer to the Rogue River, for instance. That has definitely shown a downward trend for many years. The fishery there started back in, oh, I can't remember the date precisely, but it started about 1880, as I recall, and the fishery was terminated in 1935, but there was a very substantial downward trend, and it was attributed to a large extent to that fishery.

"Q. To the fishery?

"A. To that fishery, yes.

"Q. Now, Doctor, have you examined the photographs which have been admitted into evidence in this case?

"A. Are you relating to the ones that were—

"Q. Yes.

"A. The ones that show the fishery?

"Q. Yes.

"A. Yes, I have examined those.

"MR. CONIFF: And perhaps I should refer to them by exhibit number, if I could.

"For the record, I am referring to Plaintiffs' Exhibits Number 25, 24, 23, 22, 19, 18, 20, 21, 16, 15, and 17.

"Q. Have you examined the large or rather long scroll-type map which has been admitted into evidence as Plaintiffs' Exhibit No. 13, which is located up here (indicating)?

"A. Yes.

"Q. Now, have you yourself observed any fishing effort

HAMILTON, Direct

(R.S. 1035)

in the Commencement Bay-Puyallup River area?

"A. I can't say that I have actually observed any fishing. I did see a net, or two nets, one attached to the bridge pier, and one attached to a piling dolphin, but I question whether they were actively fishing.

"Q. And, Doctor, I take it then you also have examined what has been admitted into evidence as Plaintiffs' Exhibits Numbers 37 and 38, which show the timing of the catches in the Puyallup system for the past few years?

"A. Yes, I have observed it.

"Q. Now, I ask you, Doctor, do you have an opinion as to the effect of a fishery as is shown by these exhibits upon the anadromous fish population of the Puyallup River?

"MR MCLEOD: I will renew my former objection, your Honor, for the record.

"THE COURT: The objection will be overruled.

"A. Well, to start with, in examining the layout of the fishery, recognizing, of course, that all the gear shown there was not in there at any set time, that it was there during various periods of time during the fishing season, I felt that the fishing effort which was shown there in the photograph and on the chart would be extremely effective in cropping or harvesting the Puyallup River runs.

"I also felt, too, or do feel, that such a fishery as I observed in those diagrams would take a very significant part, or could take a very significant part of the run.

HAMILTION, Direct

(R.S. 1036)

"Now, the reason I say this, I was particularly impressed with the net complex down near the mouth, which you might consider as a trap, as a catching device, for the principal reason we know that salmon when they come to estuaries, and this has been well documented, when they come to

estuaries they will tend to mill, move around in the particular area, which means that if there is a fishery being carried on in that particular area the fish are exposed to it over and over again.

"Now, in a fishery where the fish are migrating, that can be extremely effective as well, but when they are migrating they are not exposed over and and over again to the same gear, but other gear operated by other individuals, we will say.

"Also, too, in looking at this graph, and I will refer to Exhibit 37 and Exhibit 38, the length of the fishing time, the fish are exposed in this particular fishery to the fishery for a long period of time, and as a result, I have come to the conclusion that this could be an extremely effective fishery and that it would take a very sizable portion of the population.

"I might just add, too, that as far as the Fraser River is concerned, it is recorded that the gillnet fishery on the Fraser alone is capable of taking 98 per cent of the salmon migrating upstream.

HAMILTON, Direct

(R.S. 1037)

"Also, too, it is published in the Annual Reports of the International Salmon Commission that the fishery in U.S. waters, purse seine, reef nets, gillnets, are capable of taking almost 100 per cent.

"Now, we might have thought at one time that a fishery is not capable of doing this sort of damage, but it is.

"Q. Now, Doctor, what does the term "regulation of a fishery" mean to you?

"A. Well, to me regulation of a fishery means the controlling of the taking of fish by imposing such restrictions that will limit he amount of gear, the type of gear, the number of fish, or where the gear may be operated.

"Q. Do you consider regulation of the fishery necessary, of any fishery?

"A. Yes, it is an extremely important management, and with the types of gear that are available now, the

types of equipment for catching fish, I definitely feel that regulations, regulation of a fishery is necessary in order to maintain the runs.

"If we are not interested in maintaining runs for the future, that is something else again.

"Q. Now, to your knowledge, is it a common practice

HAMILTON, Direct

(R.S. 1038)

to regulate any type of fishery?

"A. Oh, yes, this is very common practice. It is practiced in Alaska, British Columbia, Oregon, Washington, California, for commercial fisheries, not only for salmon but other species as well, and it is practiced in the sports fisheries.

"Q. Can you tell us how the regulations of fishery for salmon are generally established, from you point of view as a biologist?

"A. Well, the basis for the fishery regulations is really the needs of the fish and the resource. That, I think, is the basis for any regulation.

"Now, don't misunderstand me, we are, too, at all times, as far as management is concerned, concerned with getting the maximum harvest, getting as many fish produced as we possibly can, and regulation is one way of doing this, and other ways that are being practiced, of course, include artificial spawning channels, incubation channels, hatcheries.

"They are all being directed toward trying to get the maximum harvest, and as far as regulation of the fishery is concerned, it is designed to this end, of getting the optimum escapement so that we can produce the maximum of fish possible for the fishery.

HAMILTON, Direct

(R.S. 1039)

By Mr. Coniff:

"Q. Doctor, do you know of any occasions where a commercial fishery for salmon has been closed for extended periods of time in order to achieve these—

"A. I think my best reference is the Salmon Commission again with reference to the Sockeye fishery on the Fraser, and to protect certain races, the fishery can be closed for a month, five weeks, and that is particularly true in connection with the Stuart Lake race, which migrates up fairly early and passes through the fishery in July.

"There have been extensive closures on the Fraser River during July to protect this particular race.

"Now, we can cite another example.

"Just last year the Columbia River fishery was closed for almost all of five weeks, from the end of June through the month of July, to protect the summer Chinook which were at low ebb.

"When I say closed, in almost all of that time they allowed two days of fishing, which is nothing more than a token fishing effort to get some idea of the strength of the run. When they found it was still low, the run or the fishing—the fishery was closed up.

"Q. Now, in your opinion, Doctor, should natural spawning areas for anadromous fish, for salmon, be utilized to their capacity?

"A. Well, this is just common sense, I believe.

HAMILTON, Direct

(R.S. 1040)

"We have—Nature has provided us with a, you might say, a piece of ground that is capable of providing a food product for us. To not let Nature do the job does not make common sense. It will do it at no expense to us, and it will do a very efficient job.

"Now, there are those who say, well, we can do all this in hatcheries.

"The hatchery system is not conceived to do this. The hatchery system is designed to protect the fish where, for instance, a dam is built, the spawning area has been inundated, and the spawning area is no longer available. So a hatchery is designed and built for that purpose, to take the place of a natural ground.

"But, where the natural ground is available, it should be utilized and utilized to the maximum, and that is where the regulation of the fishery is so important to provide and find out what the capacity for a particular spawning area or particular system is, to find out what that is, to produce fish and utilize it to the maximum.

"MR CONIFF: Thank you, Doctor. No further questions.

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CLIFFORD J. MILLENBACH'S TESTIMONY (R.S. 1086-1103)

• • •

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you state your full name, please?

"A. Clifford J. Millenbach.

"Q. How do you spell that last name?

"A. M-i-l-l-e-n-b-a-c-h.

"Q. Where do you reside, Mr. Millenbach?

MILLENBACH, Direct

(R.S. 1087)

"A. I reside at 2552 John Luhr Road, Olympia.

"Q. I see. By whom are you presently employed?

"A. I am employed by the Department of Game of the State of Washington.

"Q. And in what capacity?

"A. As Assistant Chief for the Fisheries Management Division.

"Q. And would you please tell us what you educational background is, sir?

"A. I graduated from the University of Washington in 1940 with a Bachelor of Science degree in fisheries, and this is the basic experience I have in education.

"Q. I see. Could you briefly describe to us your professional experience since that time?

"A. Six months after I graduated, I was employed by

the Department of Game as hatchery assistant. Approximately one year later I was moved into the office and placed in charge of the hatchery program. And with the exception of service in the Second World War, I remained in charge of the hatchery program until 1956.

"I would like to point out that in this capacity I was directly responsible for the development of the steelhead program of the Department as it is now known. This involved working closely with our district biologists in the pursuit of a great number of marking experiments which developed a knowledge of the biology of steelhead, and which developed the techniques which are now applied in our steelhead program.

MILLENBACH, Direct

(R.S. 1088)

"Q. I see.

"A. In 1956, I was promoted to my present position, and in this position I have the opportunity to broaden my association in the field of the entire program. And also I have had the opportunity to become well acquainted with the steelhead programs in the states of Oregon, California and British Columbia.

"Q. I see. Now, how long has it been that you have had your present position, Mr. Millenbach?

"A. I have been in my present position since 1956.

"Q. Since 1956. Well, I suppose a good place to start would be for you to tell us what a steelhead is, from your point of view.

"A. A steelhead is a rainbow trout which normally spends approximately two years of his, his first two years in fresh water; then due to physiological changes, it moves into the ocean where most of them spend another two years before returning to the area from which they originated.

"Let me explain that there is a considerable variation in this life history pattern. The majority of the fish do follow this pattern. Some spend only

a year in fresh water, some spend three years, occasionally four years. We have a number of fish that do not mature in four years of age, and they stay in the ocean longer, and they grow to a larger size.

"I might further explain that a steelhead is quite different to a salmon in that it does not die after

MILLENBACH, Direct

(R.S. 1089)

spawning. The survival through the second and third spawning, however, is relatively small. And a special study on the Green River, for example, approximately 5 per cent of the population have spawned previously.

"Q. Now, about how large are the steelhead? Do you know about how large the downstream migrant steelhead is when he begins his migration to the salt water?

"A. The young steelhead generally are about six to eight inches in length, and average roughly about a sixth of a pound apiece.

"Q. About how large are these fish when they return to fresh water, after the portion of their life cycle has been spent in salt water as an adult?

"A. Fish returning after roughly two years in the ocean generally weigh six to seven pounds.

"Those that stay out longer, for instance, one more year, will be twelve to fifteen pounds. A twenty-pounder usually stays out four years or more, or have spawned previously and gone back out to sea.

"Q. Now, these downstream migrants then spend, how long do the downstream migrants spend in fresh water?

"A. The normal cycle in the majority of the fish will spend two years in fresh water.

"Q. I see. Now, during this period of time, are they vulnerable to sports fishing?

"A. As I mentioned, they reach a length of six to eight inches and generally speaking the minimum size

limits for trout in the State of Washington is six inches, and this makes them vulnerable to a trout fishery, if a trout fishery is permitted.

MILLENBACH, Direct

(R.S. 1090)

"Q. Well, my next question is then, does the Department of Game make any efforts to protect these downstream, or the steelhead during this early portion of fresh water, the fresh-water portion of their life cycle?

"A. As I mentioned, the Department has spent a great deal of time in learning and obtaining information on the life history of these steelhead, and we know that the primary migration period exists from about the 1st of April to near the end of May; that these fish are, for the most part, or the downstream migrants are six to eight inches in length. They are in a period of rapid growth, and they can be readily taken by sports fishing gear, particularly with bait, and any type of artificial lures that are extremely effective.

"So the Department of Game, in its management of the streams, particularly in Western Washington, for steelhead production, has established regulations which protect these downstream migrants. They are protected during the spring of the year, both by season period of protection, and also in some areas we use a 10-inch minimum length.

"Q. Mr. Millenbach, do you have a copy of the regulations of the Department of Game with you?

"A. I have a certified copy of the temporary regulation which was established for the season of 1965.

"Q. I see.

MILLENBACH, Direct

(R.S. 1091)

"MR. CONIFF: May I have this marked as Plaintiff's exhibit? I might state to counsel, and to the Court, that the regulations of the Department of Fisheries are being prepared, but it is much more

lengthy and a more involved operation than the preparation of the Game Department regulations.

(Plaintiff's Exhibit No. 40 marked for identification)

"Q. Showing you this document which has been marked for identification as Plaintiff's Exhibit No. 40—

"MR. CONE: May I just take a moment to examine it, Your Honor? Well, I won't take the Court's time to examine it now. If you assure me that these are the regulations, I have no objection.

"MR. CONIFF: They are. I will move for their admission.

"THE COURT: There being no objection, it will be admitted as Exhibit 40.

(Plaintiff's Exhibit No. 40 now received in evidence)

"Q. Now, Mr. Millenbach, does the Department attempt to protect the adult steelhead in the portion of their life cycle which is prior to their spawning?

"A. Yes. there are a number of regulations which relate to the taking of the adult steelhead.

MMILLENBACH, Direct

(R.S. 1092)

"A. (Continuing) First there is a regulation within the certified copy which specifies the—

"Q. You may refer to these (hands to witness).

"A. (Continuing)—to the time, place and manner in which the steelhead may be taken on sports gear. Sports gear is limited to rod and reel, and which generally speaking is a rather inefficient type of gear. I point this out because it relates to the fact that the gear itself then permits an escapement of fish to the spawning grounds even though the season is open.

"I wonder if I might explain using the map the total regulations as they apply to this system?

"Q. Yes, I think that would be helpful. You may step over to Plaintiff's Exhibit 14 and use the marker if you like, Mr. Millenbach.

"A. (Witness leaves witness stand) We are talking about the adult steelhead. The season as it now exists on the Puyallup River system begins usually about the 1st of December, I think actually it was about the 6th of December last year, and it permits the taking of steelhead by sports fishermen, rod and reel, limiting a daily catch to two fish per fisherman, a possession limit of four fish, and a season limit of thirty fish. These are all restrictive and protective regulations.

"Now, further to insure escapement of spawning fish throughout the open season, there have been

place upper deadlines on the main tributary, for example, on the White River, the upper deadline above which fishing is not permitted is the Puget Sound Power and Light diversion approximately a mile upstream from the town of Buckley.

"Q. Excuse me, Mr. Millenbach, if I hand you a marking pencil, could you mark the deadlines on Exhibit 14 for us? (Counsel hands to witness)

"A. My recollection of the sketch, it doesn't permit really a good picture of portions of the river system, I mean the relative lengths are not too well depicted, but I think we can get our points across.

"The Puget Sound Power and Light diversion is in this relative position to the Mud Mountain Dam (indicating), so then on the White River we have the upper deadline, and once the steelhead gets to this point (indicating), gets through here (indicating), it has the opportunity to continue and spawn. Likewise on the Carbon River, another native tributary, the upstream deadline is the mouth of South Prairie Creek, one of the very major important tributaries of the system, and the deadline is there (indicating), above which no fishing for adults is permitted. On the Puyallup River the deadline is a railroad bridge approximately three miles east of Lake Kapowsin, but it is in an area near what they call Electron, approximately there

(indicating), and here again this is near a Puget Sound Power and Light discharge of water from a diversion.

MILLENBACH, Direct

(R.S. 1094)

"Q. Would you initial or indicate in some manner that these marks you have made are deadlines?

"A. (Witness complies with request of counsel) So then with the deadline on the river, we have a positive escapement of fish beginning with the opening of the season. Once the fish get that far they can proceed and spawn. Likewise we have assurance for escapement for spawning purposes in that tributary streams are not open. Voight's Creek is not open. As I mentioned, this was a limit on the Carbon. South Prairie Creek and Wilkeson Creek, two tributaries, are not open. Nor are a number of the smaller tributaries which do provide steelhead to the Puyallup River.

"Q. I gather not all of these smaller tributaries you are referring to are depicted on this illustrative exhibit.

"A. No, they are not.

"Q. All right. I take it then from your testimony, Mr. Millenbach, that you are familiar with the Puyallup River system?

"A. Yes, I have been on it, I have flown the entire system and been on it a number of times.

"Q. In your opinion, is this an important steelhead producing river system?

"A. Prior to the Indian net fishery in the lower area—

"MR. CONE: Your Honor, may the witness be instructed the question may be answered yes or no and then he may explain his reasons?

MILLENBACH, Direct

(R.S. 1095)

"THE COURT: Objection sustained.

"Q. Would you just answer whether—

"A. Yes, in my opinion, it is.

"Q. Would you tell us what your opinion is, Mr. Millenbach?

"A. I base that on the records that, which as I mentioned, the Puyallup River would be leading steelhead producer in Western Washington prior to the period of that fishery at the mouth, and last year the catch indicated it was fourth in the State.

"Q. Now, is the production of the steelhead in this river system totally due to natural spawning, or is there some other reason or contributing factor to the production?

"A. The Department of Game has established a very successful and important steelhead program through the procedure of rearing steelhead in hatcheries to the downstream migrant size. (Witness resumes witness stand) And the Puyallup River has been on this type of supplemental planning since 1952.

"Q. I see. Do you have this data with you and available as to the plants?

"A. Yes, I do.

MILLENBACH, Direct

(R.S. 1096)

By Mr. Coniff:

"Q. Now, can you explain how this planting program has been applied to the river since it was initiated?

"A. The average annual stocking on the Puyallup River has been approximately 65,000 downstream migrantsized steelhead.

"These are generally planted in the latter part of April and the early part of May, and occur in a closed period as far as fishing is concerned.

"Q. Do you have any data or records or any way of determining how successful this program has been?

"A. Two years ago the Department of Game personnel were instructed to maintain a record of the number of fish they observed which had deformed dorsal fins, and let me explain that in our hatchery rearing program that due to the fact that the fish are concentrated in a rearing pond they feed very actively, and the dorsal fin is frequently perma-

nently deformed and damaged, and this is a certain sign of hatchery rearing, if you note a deformed dorsal fin on a fish.

"Now, in nature there is the odd case where due to a predator or something a fin becomes mutilated, but it is extremely rare, and in our hatchery procedure the percentage of fish that receive the deformed dorsal fin varies depending on the loading of the pond, but this is a certain identification of hatchery origin.

MILLENBACH, Direct

(R.S. 1097)

"Now, in the 1962-1963 season our personnel maintained a record and observed 61 per cent of the fish they checked had the deformed dorsal fin.

"Q. Now, Mr. Millenbach, have you examined the map, the large scroll map which has been admitted into evidence as Plaintiffs' Exhibit 13?

"A. I have seen it only as used in the court.

"Q. But you have—

"A. Yes.

"Q. Have you examined the photographs which have been admitted in evidence?

"A. I have not examined that in real detail; I have seen them.

"Q. Well, have you personally observed any of the net fishery in the river?

"A. At times, as I have gone by the Puyallup River I have seen portions of the net fishery.

"Q. Now, do you have an opinion as to the effect of this net fishery on the steelhead resources of the Puyallup River system?

"Just answer that yes or no.

"A. Yes.

"Q. Would you please tell us what your opinion is?

"A. In my opinion the effect on the steelhead resources of the Puyallup River relates, of course, to the amount of gear fished, the manner in which it is fished, and the type of gear that is fished.

"It is my opinion that if there were no supple-

MILLENBACH, Direct

(R.S. 1098)

mental plantings on the Puyallup River, and net gear was fished to its capacity, and without any control of this fishery, the steelhead resources of the Puyallup River could not be maintained.

"Q. Now,—

"MR. MCLEOD: If your Honor please, I will object to this witness coming to this conclusion on the grounds that he hasn't shown that he has the factual data from which to support this conclusion; second, that he hasn't been properly given a hypothetical question including the factual data and all of the factors involved in this fishery, and I would therefore like to have a continuing objection to his testimony, and I would like to move to strike it.

"THE COURT: The objection will be overruled; the motion will be denied.

"You may have the continuing objection.

"Q. Now, Mr. Millenbach, does the Department of Game—let me rephrase.

"In your opinion, is it important to have a complete regulation or a total regulation of all fishing effort on steelhead, insofar as the steelhead are concerned in the Puyallup system?

"A. In my viewpoint, it is impossible to manage a fishery without total regulation. I have attempted to point out that the Department now has very restrictive regulations in regard to the sports take

MILLENBACH, Direct

(R.S. 1099)

of steelhead, and we have over the years developed a record to substantiate the fact that these types of regulations do sustain the fishery at a high level.

"I would like to reiterate and emphasize that first of all we have a guaranteed escapement of fish into the upper reaches as a result of the upstream deadlines. Our season is limited to only a portion of the duration of the run. The season

on the Puyallup terminates the end of March. The steelhead run in the river until June. So there is a positive escapement from that angle.

"The gear itself is very restrictive, and in furthering the steelhead program we have established on the Puyallup River a closure from the end of the winter steelhead season until July 1, which provides for almost full protection of the downstream migrants.

"In other words, you can only catch a fish once, so you have to protect in this instance both the juvenile and provide for some escapement of adult fish.

"Q. I see. Now, as I recall your earlier testimony, I believe you marked on the map that—I will rephrase the question.

"It is possible to catch fish below that deadline you have indicated on the White River, is that correct?

"A. Yes.

MILLENBACH, Direct

(R.S. 1100)

"Q. Now, the streams above the Mud Mountain Dam, which is portrayed on Plaintiffs' Exhibit Number 14, are they utilized by steelhead for spawning purposes?

"A. Yes, they are. The fish which are trapped at the diversion dam downstream from Mud Mountain Dam are hauled and liberated above Mud Mountain Dam, and most of that watershed is available to spawning steelhead.

"I might state further that these regulations prohibit the taking of fish over twenty inches in the White River, the tributaries, which is further protection of spawning steelhead.

"Q. Now, do you know when this diversion dam was built here on the White River?

"A. It was finished approximately in 1940.

"Q. Was there any count made of the steelhead that was transported around the dam at that time?

"A. We have the records and the number of fish which have been transported since 1941, around Mud Mountain Dam.

"Q. I see. Could you tell us what these records show? And if you have the records with you, you may refer to them.

"A. I can state from memory that generally the magnitude of the steelhead run was close to 2,000 fish for a period of approximately twelve years, and since that time there has been rather a sharp decline, and the number hauled last year was 274 fish, steelhead.

MILLENBACH, Direct

(R.S. 1107)

"Q. Do you happen to know if there is a fishery on what is denominated on Plaintiffs' Exhibit No. 14 as the Muckleshoot Indian Reservation?

"A. Yes, there is a net fishery for steelhead on the reservation.

"Q. Do you have any figures as to the numbers of steelhead taken by this fishery?

"A. Again, the earliest data we have, and this is rather meager in that our source of data is not a firm or positive one—let me point out to the Court, if I may, since steelhead by statute are a game fish, there are no regulations or provisions for handling them in a commercial manner, and consequently there are no fish tickets as apply to the salmon catch or salmon take, and our information then has been limited to what has been supplied by the Department of Fisheries, which was obtained primarily by personal contact and discussion with the Indian people who engaged in the fishery.

"Q. Now, the Indian people—you are referring now to the Indian people residing on the Muckleshoot?

"A. The Muckleshoot Reservation.

"Though to answer specifically your question, the early data we have dates back to 1953, '54, at which time the Indian take was bteween one and two thousand fish, yearly average.

"According to the best records we have been able to obtain they took seven hundred fish last year.

MILLENBACH, Direct

(R.S. 1102)

"Q. I see. Now, how about the sports catch of steelhead in this stretch in the White River during this period of time?

"A. Again our records are limited as to time.

"The first year for cards was the 1947-1948 season. This was the first year in which we have a record of the sports catch, and for that year, the following nine years, the average catch was approximately 767 fish, and the last six years there has been a reduced escapement also, as I pointed out in Mud Mountain Dam, the average catch has been only 334 steelhead.

"Q. That is in the White River?

"A. This is the sports catch in the White River.

"Q. What in your opinion is the most important factor in the decline that you have just described in terms of the sports catch?

"A. Because of the long, rather long period of some twelve years or so in which the escapement of steelhead over Buckley Dam or hauled around Mud Mountain Dam was between one and 2,000 fish.

"There has been an intensive Indian fishery below there, reducing the numbers in recent years now, to where it was 274 last year.

"It appears to me that in view of this record that there is insufficient steelhead escaping up the White River system to maintain those stocks at a high level.

"Might I also include that the Department does

MILLENBACH, Direct

(R.S. 1103)

not have a supplemental program of planting hatchery fish on the White River, so that the rec-

ords do relate to the natural stock of fish that exist there.

"Q. I see.

"MR. CONIFF: No further questions.

"MR. MCLEOD: Your Honor, I will renew my motion to strike on the grounds previously stated.

"MR. CONE: I think I may have twenty or twenty-five minutes worth of cross examination.

"Do you desire to continue now, or take the recess at this time?

"THE COURT: I think we should continue at this time, and we will see how we go along.

"MR. CONE: Thank you, your Honor.

° ° °

(R.S. 1130)

RICHARD VAN CLEVE'S TESTIMONY (R.S. 1130-1149)

"DIRECT EXAMINATION

By Mr. Coniff:

"Q. Would you please state your name and address?

"A. Richard Van Cleve, 4537-51st Street Northeast, Seattle, Washington.

"Q. Would you please tell us what your educational background is?

"A. I received my Bachelor of Science degree in Biology from the University of Washington in 1926-27; attended the Fisheries, Pacific Fisheries, Stanford University, 1931; received a Ph.D. in Fisheries and Mathematics, at the University of Washington in 1936.

"In 19— do you wish me to continue?

(R.S. 1131)

"Q. You might just continue on, and tell us your professional experience.

"A. Professional experience: In 1926 I took possession

of the International Pacific Halibut Commission as an Assistant Scientist, and stayed with them until 1941, when I was appointed Director of the Bureau of Marine Fisheries for the California Department of Fishery, the California Fish and Game Commission.

"It was at that time and in that capacity that I had charge of the research program, and the management program for both marine and anadromous fisheries in the State of California, and was particularly concerned with the salmon salvage programs in the Sacramento and San Quentin programs.

"We have a considerable program, a cooperative program, and with the Fish and Wildlife Service and the Department of the Interior, or the agencies in the Department of Interior, and attempting to maintain these salmon runs in the face of the irrigation and power developments in this area.

"We are also concerned with the management of the fishery in the Sacramento River, and outside, the troll fishery throughout the coasts of California.

"In 1946, in March of 1946, I took a position of Chief Biologist with the International Pacific Salmon Fisheries Commission, with headquarters in Westminster. And this, in this capacity I was in

VAN CLEVE, Direct

(R.S. 1132)

charge of the Research Program concerned with the Sockeye salmon on the Fraser River.

"And in 1946, I, as soon as I got in there, I was placed in charge, and with responsibility and, of the development and the management program for the Fraser River Sockeye fishery, which extended out into the Straits of Juan de Fuca, and was governed by the International Treaty between Canada and the United States.

"In 1940—well, during this time, too, it was my responsibility, it being my responsibility to govern the, direct the research program.

"I found it necessary to visit all parts of the Fraser River and become familiar with the various types of fisheries, Indian fisheries in this area, which extended from the Hell's Gate Canyon throughout the most, a good part of the watershed.

"In 1948, in September, I was appointed Director of the School of Fisheries at the University of Washington.

"In 1958 I was appointed Acting Dean.

"And in 1960, my title was changed to Dean, which position I still hold.

"Q. Are you a member of any professional societies?

"A. Yes. It is a long list of societies of oceanographic fisheries societies.

"I am Vice-President of the American Institute of Fisheries Research Biologists, and most of the

VAN CLEVE, Direct

(R.S. 1133)

societies that are concerned with oceanographic fisheries, and oceanography.

"Q. Have you published any articles, Doctor, concerning anadromous fish?

"A. Yes, I have. I have published several articles on the salmon problems in California, and was particularly concerned with the program of the realignment of salmon management.

"I have published articles regarding the Fraser River, the general program of the Fraser River.

"And then, among other things, recently I was, would have been concerned with the international regulations of international fisheries in the North Pacific, and specifically with the International North Pacific Treaty, and its operations.

"I published a paper on that in 1963 with Professor Johnson of the Law School of the University of Washington.

"Q. Now, Doctor, are you familiar with the anadromous fishery populations in the Puyallup River system?

"A. Yes. In connection with some of the work that

we were, that we contracted with the Corps of Engineers, in 1953, I believe it was that we undertook the contract to investigate the effects of, or the various techniques for guiding young downstream migrants.

"And one of our particular responsibilities was the investigation of the possibility of use of elec-

VAN CLEVE, Direct

(R.S. 1134)

tricity in guiding those migrants.

"I had already had some experience with this at another fishery, and in the fire bowl district in California.

"It was this particular type of structure, and so we set up an experimental apparatus in the Buckley area, and we had an opportunity to—of course, we used mostly the stock that we introduced ourselves, but we did that, or we did have a natural stock coming down, and I was—I had an opportunity at that time to look periodically at the White River, and I have looked over the various tributaries of the Puyallup, but I have not made any particular study of these.

"Q. Now, Doctor, have you examined the exhibits which have been filed in this case this morning?

"A. Yes, I have.

"Q. Have you ever observed any net fishery in Commencement Bay in or around the mouth of the Puyallup River?

"A. Yes. I went down there just last month. I think it was on Thursday, two weeks ago tomorrow, I believe. And there was some, there was a fishery at that time, not very intense, of course.

"Of couse, the river was very high, but we did see some nets in the river, and we talked with some of the people who were fishing there, and on the dock.

"At the mouth of the Puyallup River, I observed the nets that were lying there.

VAN CLEVE, Direct

(R.S. 1135)

"Then there was a monofilament net which was very easy to see. It was very easy to see this. And this is an extremely effective piece of type of fishing gear.

"Then, farther upstream, there was a rather interesting method of fishing being exhibited there, where the upstream ends of the net were attached to the, let's see, it would be to the right bank, and just above one of the bridges.

"And the rest of the net was held out from the bank by a long pole, forming a "V" fish trap for salmon that would migrate up the edges of the stream.

And the Indians at that time had three beautiful-looking Steelhead they had just caught.

"Q. Now, Doctor, based on your observation, and also based upon your review of the exhibits that have been filed in this lawsuit, do you have an opinion as to the effect of this Indian fishery upon the anadromous fish population of the Puyallup River system?

"MR. MCLEOD: I will object to this question.

"This witness has not demonstrated that he has made any scientific tests, or that he has sufficient data on which to base any opinion, and I will move that his testimony be stricken.

"I will also object to any testimony that he gives on the subject.

VAN CLEVE, Direct

(R.S. 1136)

"THE COURT: I think it would be well, Mr. Coniff, to explore a little bit more the Doctor's qualifications in that respect, if you would.

"MR. CONIFF: Fine.

By Mr. Coniff:

"Q. Doctor, have you received data published by the Washington State Department of Fisheries in their Annual Reports?

"A. Yes.

"Q. With regard to the Puyallup River?

"A. Yes.

"Q. The Indian catch records?

"A. Yes.

"Q. Have you examined what has been marked and admitted into evidence as Plaintiffs' Exhibits Numbers 33 and 34, which portray the relationship of the catches to the escapement?

"A. Yes. Of course, we, these don't show everything, because they, for example, the the Puyallup-White River Chinook salmon catch, a Silver salmon catch in 1964 is not up, largely because of my—I was informed that after the Indians were pulled out of the river—

"MR. MCLEOD: I will object to the Doctor's testifying as to any information that he has received that is hearsay.

"THE COURT: Objection sustained.

"MR. MCLEOD: I think he should be restricted as

to what he knows of his own personal knowledge.

"THE COURT: Objection sustained.

"THE WITNESS: Your Honor, may I testify as to what I have read and as to what has been published?

"THE COURT: As to your studies, you may, yes.

"THE WITNESS: In 1964, the escapement to the hatchery, I think it rose ten times over the escapement in 1963.

"And this is associated with the fact that the—apparently there was no net fishery at the mouth of the river.

"MR. MCLEOD: I object to that, to the conclusion, your Honor, and move that it be stricken, on the grounds that this witness has shown no personal knowledge, and has made no tests, and is not capable of giving an expert opinion on this subject.

"THE COURT: The objection will be overruled.

"MR. MCLEOD: Now, could I have a continuing motion to strike, your Honor?

"THE COURT: You may.

"MR. MCLEOD: And a continuing motion to exclude this witness's testimony?

"THE COURT: You may. Continue.

VAN CLEVE, Direct

(R.S. 1138)

"MR. CONIFF: Thank you.

By Mr. Coniff:

"Q. Dr. Van Cleve, I don't mean anything personally, but I feel that we are on a technical basis here at this point.

"A. You are perfectly at liberty, sir, to ask any questions you wish.

"Q. Now, Doctor, I believe you have testified then that you have reviewed the data which would show that the—

"MR. MCLEOD: I will object to the publication, your Honor, and to Counsel leading this witness, and telling him what to testify to. I will move that the question be stricken.

"THE COURT: Objection will be overruled.

By Mr. Coniff:

"Q. Am I correct in stating, Doctor, that you have testified that you have reviewed the data relating to the fishery population of the Puyallup River system?

"A. That is correct.

"MR. MCLEOD: I will renew my objection.

"THE COURT: It will be overruled.

"Q. Now, again, Doctor, I will ask you, do you have an opinion regarding the effect of the Indian net fishery upon the anadromous fish population of the Puyallup River system, and answer yes or no.

"A. Yes.

"Q. Would you please tell us what you opinion is?

"A. Can I diverge a little bit with this answer and give

(R.S. 1139)

you some basis for my opinion?

"Q. I wish you would.

"A. The basis—this probably will be a little bit lengthy, but to give the background for my judgment in this case it goes back to the, first to the structure of the salmon populations and their habits, and in the migratory return from the ocean, and the relalationship between the escapement of the adult salmon, and the amount of salmon, the number of salmon that are produced.

"Taking things up in what I hope to be a logical order, in the first place the salmon populations have been found to consist of numbers of independent units. We call them races.

"These units, these independent units usually inhabit either independent streams, small streams, and in the case of the fairly large streams you have independent units that occupy portions of those streams.

"The evidence of this is legend. The legend—one of the best examples that I could cite was the investigation of, well, the records of what happened up on the *Burtonhead* River in Canada, near Harrison Lake. As a result of some of the early hatchery operations that required the collecting of adult sockeye salmon, to spawn them and put the eggs in the hatcheries, this was an attempt to rehabilitate upriver streams that had been depleted through the rock slide at Hell's Gate.

VAN CLEVE, Direct

(R.S. 1140)

"The first weir was put not far from the upper end of the spawning area, and within a few years no more fish came up to this weir. So it was impossible for the hatchery people to catch your Sockeye salmon.

"For example, some species moved the weir downstream. The same thing happened again until the, finally when, or in the early 1930's when the

hatchery, salmon hatcheries were eliminated in *Brich*, B.C., the weir location was about a mile above the mouth of the *Burtonhead* River, and the runs above this area had been eliminated.

"But even in 1946 when I took over the direction of the biological work for this Commission the run was still confined pretty much to this lower area. And they had not recovered the runs above the location of the weir, and had not recovered—and they did not recover for another eight to ten years.

"Well, about two cycles of—it was after the closure, after the regulations of the fisheries that was inaugurated that migration began and increased the escapement, and increased the pressure in this area in the lower region.

"Then it built up this, and it indicated that in separate parts of that one river you had separate and distinct self-perpetrating races of fish that were very difficult to rehabilitate.

"This has been further indicated—I refer again

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(R.S. 1141)

again to the Fraser River because this is where the most work has been done, the most meticulous work has been done in these races.

"In our attempt to rehabilitate some of the streams, we transplanted fish from the other streams that were closely associated with these in the type of character of the stream, the temperature cycle and the weather cycle, the stream flow, and in the nature of and the length of this distance from the ocean.

"And we would take from the, one stream, and put the eggs into the other stream, and in some of these we have not yet, even though many attempts have been made since then to, since 1948 when I left the fishery, to establish runs in these new streams, they have not been able to establish them because of some difference between them that is not yet understood, between the two races.

"So the races to these two streams are quite individual.

"Now, this means that in developing a program for escapement, it is necessary to provide escapement from each race, and it isn't a matter of just providing a chunk of fish from any part of each run.

"It is necessary to understand, in a fair amount of detail, that is, if you are going to have a really efficient management program, the method of, or the manner in which these fish approach the river,

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(R.S. 1142)

and move upstream.

"This is the characteristic of most species, in fact, all of the species, that the fish in different races will normally arrive at different times.

"In these latitudes the time at which a particular race may appear at the mouth of a stream and migrate up is likely to be, occur over a considerable length of time.

"We have a different situation in the Bristol Bay area. I am concerned with this because we have the Fisheries Research Institute as part of the College of Fisheries under my direction, and that is under my administration, and periodically I visit the Bristol Bay area and observe the, our rather complex biological program.

"This is a cooperative program with the State of Alaska, Fish and Wildlife Service, and International North Pacific Commission.

"Here you have the races, a very complex situation where the races appear at the mouth of the river in a very brief period of time, so that you have a different management program problem, but it is just one of the technicalities.

"But anyway, each one of these races has to be managed independently, and as independently as possible. And the escapement has to be very delicately balanced to allow escapement of all parts of

each race, because each race consists of a, what we call in genetics, a gene pool, which is actually

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(R.S. 1143)

the basis for the genetic inheritance of a particular race or particular population.

"Within this pool is expressed the, some of all the variabilities of this particular race.

"And in this variability is an important group of factors which permit the particular population to adjust itself to the changes in environment that normally occur and the success with which a population adjusts itself to the changes.

"The variability of these environments is a measure of the variability in the gene pool.

"Now, if you take, and if you cut out a particular section of a race, you are cutting out a particular variability of this race.

"Now, of course, you have the tendency of the population to, even within each segment, to vary to a certain degree, and of the group itself to maintain the identity of this particular stock or population, but the fact nevertheless remains that the essential factor in management is the provision of a portion for escapement from all parts of this particular, of each particular race.

"And for this reason it is extremely difficult to provide adequate and intelligent management in a fishery which is not managed in a manner to permit the escapement of all parts of these races.

"A good example of what can happen in a case of this kind was a situation that I observed in

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(R.S. 1144)

the headwaters of the Fraser and again up over the Driftwood River. This is the headwaters of the Stewart system and approaches the coast range to the north, and east of Prince Rupert, and this is—let's see, the Driftwood River, that runs into *Pakla* Lake. There is a large chain of lakes that

was extremely; or was in the past extremely productive of salmon.

"In 1947 I was looking over the situation with a view to attempting to rehabilitate the Sockeye runs in the Driftwood River. We had reports of this river and the biologist that was in charge of this area had reported to me that it was an excellent stream. And so we flew to the headwaters of this stream, and came down so that we were able to walk to it, and so I was able to see it in the—well, it was in August, at its best, and at the time when the Sockeye were supposed to have been coming in here.

"And this was the early run of the Stewart before it came up, formerly came up the Stewart, that is.

"And at the time that I came here, I met a very interesting person by the name of Bear Lake Charlie. And Bear Lake Charlie I first encountered in the text of the book called *Driftwood Valley*. It was a very interesting book about some people that went up and lived in this very primitive area away off from the end of civilization for about five

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(R.S. 1145)

years, and Bear Lake Charlie was one of the principal characters in this book, so I ws extremely interested to meet this old boy.

"And we met him on the river going down. We met him at the, when we first landed, and he introduced himself and his family and his son, and so we asked him what he was going to do.

"He said he was going to hunt wolves. He called them "wooves." But then we encountered him again when we came into some of the places there, and they were some of the finest—we were looking for areas or looking at areas that would have been excellent spawning areas in the Driftwood River there, and here was a net stretched across the river. And we were just out there looking at the net, and preparatory to hauling our canoe in and all of the

gear around it, and when, or then Bear Lake Charlie and his son appeared, and he apologized profusely for the poor net because he said it wasn't a very good one, it left three feet of gap on one end.

"And he said, "You can come back next year," he said, "and I will have a good net then, stretch it right from bank to bank; no salmon get through."

"I don't think that this, that his net would have been very good because in the entire course of this river—it took several days to drift down—we didn't see a single run of Sockeye. There were literally millions of the *Cochineal,* the landlocked

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(R.S. 1146)

form of these fish, but the heavy fishery on this river had really taken every Sockeye out.

"And this is what happens when you have situations of the populations that have to be adjusted, properly adjusted to reproducing itself under rather difficult conditions as you have in these high latitudes.

"Q. Do you know of any other Indian fishery other than the one you have just described?

"A. Yes. We had the—I first encountered an Indian fishery in the Trinity River in California.

"Q. This was—

"A. This was right at the base of Eureka on the Trinity River that goes from Eureka into Redding, and in this river there is a very interesting fishery on the Trinity River runs—which, incidentally, is limited for many reasons—and for many reasons I included this fishery, or set it as a very low, at a very low level, but the Indian fishery there was a brush weir which was right across the Trinity River.

"They had platforms on this weir from which they dipped fish. And unfortunately, the weir was put in, of course, before the fish came up, but the Indians for some reason or other never took it out. It was left in there.

"After they had taken the fish that they wanted the weir was left in there, preventing the access of fish to the upper stream, from which the fish were locked out.

VAN CLEVE, Direct

(R.S. 1147)

"Another very interesting fishery was at *Salala* Falls. Here again the effects of this were measured by the escapement at, over the John Day dam, or over the—I mean the McNary Dam before and after the construction. I had occasion to observe this fishery a number of times. And some of our students were working on the fishery for the State.

"I have also had occasion to study this fishery. Since last year I was, or I have been consultant for the Army Engineers on the problems connected with the, the fishery problems connected with the John Day dam which is between The Dalles dam and McNary, and when this, when The Dalles dam was closed and the water flooded, this fishery was —I think that was 1957, the escapement of fish over McNary dam, the fall run of Chinook, which is the time that the Indian fishery was particularly effective, increased from four to six times, and it made that much difference in the escapement of the fall run.

"Other Indian fisheries, of course, aside from the Fraser River, I have seen fishing in the Yakima at the Yakima dam, and this, according to the records that have been put in evidence, is that it is extremely effective there too.

"Q. Do you know, Doctor, if the Indians have ever—well, let me put it this way: Has any group of

VAN CLEVE, Direct

(R.S. 1148)

Indians ever come and consulted with you, or asked any member of your staff, or ever come to you and asked you how to set up any type of regulation for these fisheries?

"A. Yes. Mr.—Oh, heavens, I can't remember the name now, but there was—the Makah Indians and sev-

eral other tribes, the Tulalip Indians, worked, or asked me, asked us at various times to help them set up regulations, but things never got around to developing because they couldn't agree among themselves as to how this should be done, or whether it should be done, so we have never been able to, this has never come to anything. But we have always indicated our willingness, although being a body of people which is operated under a state budget which supports us entirely for teaching, we are unable to spend money, we have no money to spend in travel around and in putting students on the study of the kind, the kind of studies that would be necessary to develop a management program.

"Apparently the Indians have been able to get money. We haven't been able to get money ourselves though.

"Q. Now, Doctor, in your opinion, what is the—well, let's put it this way: What would be a proper management—what are the management goals, would you consider to be the proper management goals of the state agencies of the Department of Fisheries?

"A. Well, the state agencies are the responsible agencies—the agencies responsible for conservation of

VAN CLEVE, Direct

(R.S. 1149

the fish, and "conservation" does not mean saving these fish to, that is, preventing the capture of these fish. It means the development of the runs, and speaking particularly with respect to salmon. But it also holds true with respect to all other species too.

"They obtain the maximum catch, that is, the population that each population is capable of producing, and this is the, means that we should have maximum utilization of all the facilities and all the spawning areas of the salmon.

MR. CONIFF: Thank you, Doctor. Your witness.

* * *

(R.S. 121)

DR. DONALDSON'S TESTIMONY
(R.S. 121, 132, 144)

about here, in general terms, implies that there would be adequate numbers of fish go to these spawning grounds to maintain their run.

"I didn't necessarily say when they would be taken or how they would be taken, but just that we have to have that many fish to keep the run going.

"Q. Would it be fair to say, then, that from your standpoint, as an eminent fish conservation expert, that you must have a certain level of return, and you don't particularly care how you get it, as long as it comes back?

"That is not a loaded question, but you just want the fish, you want the end product, and you want that many fish arriving upstream?

"A. You have to have enough brood stock in the case of salmon. I think my testimony has introduced this rather vividly, to maintain the runs at a productive level.

"Q. But if you fall below that level, it doesn't make any particular difference to you, does it, sir, whether the fish have failed to arrive because they were killed by pollution, whether they failed to arrive because they were killed by, they were killed out in the ocean by Japanese fishing, whether they were caught in the Puget Sound, or where they were caught, as long as they didn't get through; is that correct?

"A. The fish is dead one way or the other.

DONALDSON, Cross

(R.S. 132)

"A. Well, again, I think my comments have been quite obvious in this case. We would only take them once. Where would—do we take them? We take them in the fishery, the over-all fisheries, or do we take them in the special fisheries? I think I have commented on this matter that it would be most difficult or impossible to operate—

"Q. Well, would it be a fair statement, now that you have said 100 per cent of those salmon which enter the Puyallup River should arrive on the spawning grounds, is that a fair summarization?

"A. Right.

"Q. All right. Does this mean that all of the catch of the salmon, and all of the taking out of it, from your viewpoint of proper and adequate conservation, should be taken during the time that the salmon progresses through Puget Sound and down to Commencement Bay?

"A. I didn't testify to that.

"Q. No, what I am trying to find out is where, from the conservation standpoint, do you believe the catch should be made?

"A. Well, it doesn't make any difference where it is made, actually, as long as you have—you must maintain adequate escapement for spawning. It doesn't make any difference where you take the fish. It doesn't make any difference whether you take them at Port Ludlow or the Straits of Juan de Fuca, or out in Neah Bay.

DONALDSON, Cross

(R.S. 144)

• • •

"Q. Now, —

"A. (Continuing) That enters into the adequate escapement for maintaining the run.

"Q. Well, would it change your opinion if I were to tell you that in 1956 that the sportsmen took 18,500 steelhead behind this Indian fishery, that is 18,500 steehead behind the Indian fishery of the Puyallup; would that surprise you to know that?

"A. I know that.

"Q. Well, now, in effect, did you know that the Indian took less than 1500 fish that same year?

"A. There are other ramifications that—

"Q. Well, Doctor, I am asking you.

"A. You are asking me?

"Q. Yes, I am asking you: did you know that?

"A. Yes, I knew that. There are other ramifications also.

"Q. Do you think it is fair for you in charge of management to say that the Indians go out, and the sportsmen can continue to take 18,500 fish, and the Indians only 1500?

"MR. CONIFF: Objection, your Honor.

"THE COURT: Objection sustained.

"MR. MCLEOD: Your Honor, I think that—

"THE COURT: You asked him a question that is argumentative, and is not fair. Objection sustained.

DONALDSON, Cross

* * *

(R.S. 210)

OFFICER WAYLAND
(R.S. 210, 263, 281)

"Q. Of your own knowledge, isn't it correct that the Indians of that area who drift net, or conduct drift net fishing, do so primarily only at the time when the tides are changing?

"A. I am a little vague on that because I am not a fisherman with a net. I assume that, yes, the tide has got something to do with it.

"Q. This would leave several hours between times when they could fish, is that correct?

"A. That is true.

"Q. It takes some time, based on your observation, to take the drift nets, and get back upriver with it after you have finished drifting to the point where you are going to stop?

"A. Yes.

"Q. So you didn't mean to convey the impression that the Indians have a permanent barrier across that point, and were taking everything that came up the river?

"A. I wouldn't say they were taking everything; however, when they are drift netting, the set nets are still in there. Drift netting would be in addition.

"Q. This is not a permanent barrier stretched across from bank to bank, and top to bottom; it's something far different, based on your own observation?

"A. My own observation, it would be while the net is in the water.

"Q. That is right, but it is not permanently there?

"A. It isn't.

WAYLAND, Cross

* * *

(R.S. 263)

"Q. Do you know what effect, if any, these log booms have on the set nets in the river that you have indicated?

"A. If I might explain, I know of several times it has affected them.

"Q. In what way?

"A. One, as a matter of record, which I believe is in this courthouse, of a tugboat taking out a portion of nets in the river, and a suit filed against the Tugboat Company.

"Q. How many nets were taken out, if you know?

"A. I am just going by memory. As I recall, 300 foot of nets at $300, and $100 a day for the net, or 300 feet of net, which had not caught fish for one week, or I believe it was a suit for a thousand dollars.

"Q. How long were these nets out of the river as a result of this?

"A. I don't know, sir. I believe this happened prior to my being stationed in this area.

"Q. Do you know of any other incidents where a log or log boom have taken out thsese nets?

"A. I have talked with Jack Moses, and Junior Satiacum, and they have told me at times they have removed logs from the river without prior notice to them, and they have lost nets in this manner.

WAYLAND, Cross

* * *

(R.S. 281)

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"Q. Officer Wayland, I believe you testified this diagram you prepared is not to scale; is that correct?

"A. That is right.

"Q. That it is, to the best of your ability, a portrayal of the conditions on the river, the geography and so on?

"A. With the exception of the upper panels which are highway maps, and they are, I would say, to scale.

"Q. Now, I believe you have also testified that the net locations that you have drawn on here at the various points are more or less a compilation of your total experience with the river, the total observation you have made?

"A. Yes.

"Q. In addition to any of the net locations which are shown, or depicted here by—your marks are on the map—but have you ever observed any other nets in any other locations in addition to those net locations shown on that map?

"A. Just one.

• • •

(R.S. 544)

OFFICER SARDANOV
(R.S. 544, 554)

• • •

"Q. Are you able to tell us the number of catch that they would make out there? I appreciate that you wouldn't know the number of fish, and that type of thing, but—

"A. It just depends on if the fish are running. I have fished with a purse seiner with three different nets, three different net settings, and didn't even catch one fish.

"Q. What is the largest catch?

"A. The largest catch that I made was up to 2500 or 3,000.

"Q. How long does it take to run this entire operation,

from the commencement, to get the net out of the water?

"A. (No response.)

"Q. You have brought the net back and put it into the boat, and got the fish, and then you are ready to make another run; how long does it take?

"A. That is done in about three hours.

"Q. So you can run two or three of them in a day, couldn't you?

"A. Just about. You could run two or three.

"Q. Is it determined on whether or not you have a hot spot, as far as fishing is concerned?

"A. You don't know. You don't know until you have an opportunity to set the net.

* * *

(R.S. 554)

* * *

"Q. How many feet north of that projected line is it from Brown's Point then?

"A. It's on the northwest.

"Q. It's on the border, or—

"A. Northwest of Brown's Point.

"Q. So we are talking about Brown's Point where the commercial fishing—

"A. North of that.

"Q. Just north of it, but on Brown's Point—we are not talking about something a mile north of it, or—

"A. Just from where the light is on Brown's Point, north of that line.

"Q. That would be a few feet north of that light?

"A. (Nods head affirmatively.)

"Q. The whole area?

* * *

(R.S. 593)

GEORGE SMALLWOOD'S TESTIMONY
(R.S.P. 593, 596, 597)

* * *

"Q. Now, I will ask you to examine Plaintiffs' Exhibit No. 26, the markings that appear thereon, at the mouth of the Puyallup River, and ask you if that to you is an accurate representation of the complex of nets which you yourself have personally observed in your patrols of the river?

"A. I have observed similar accuracies—or, I mean, similar pieces of netting in the river.

"Looking at it, it appears that, to me, that it crossed about, about halfway across the river at the mouth.

"Q. Now, I believe the exhibit would speak for itself.

"A. Yes.

* * *

(R.S. 596)

* * *

"Q. All right. Thank you:

"Officer Smallwood; do you mean to indicate that the complex of nets that are at the mouth of the river—let me accurately state the question.

"Do you mean to indicate that the nets which you have actually observed have the same length of, as those nets depicted on the exhibit would have if they were drawn to scale?

"A. No, sir.

"Q. You never saw a 900-yard net out there, did you?

"A. No, sir. According to, looking to the map there, I am trying to be as honest as absolutely possible,

SMALLWOOD, Cross

(R.S. 597)

I never saw a net that would cover halfway across the river, about, or quite halfway across the river.

* * *

(R.S. 670)

J. E. LASTER TESTIMONY
(R. S. 670, 672, 673, 809, 815, 832, 833, 849, 850, 855, 861, 862, 865)

"MR. CONIFF: Well, your Honor, I could take it point by point if you so desire.

"THE COURT: Well, I think the point is well taken, based upon the fact that the diagrams as made by the witness on the map are certainly not to scale, and I do think that you have added some points here that are not sustained by the evidence yet, at least.

"For example, your use of the words of virtually sweeping the river free of fish, I don't find any evi- to that effect; yet, anyway.

"I am going to allow you to reconstruct your hypothetical question, and I am going to take a recess at this time.

"I would like to ask Counsel to meet me in Chambers, please.

LASATER, Direct

(R.S. 672)

you have not filled the spawning grounds. You are working two important things at the same time if you do otherwise.

"Q. In other words, these other mortality factors in the total life cycle of our fish stocks, and salmon stocks, are adjusted, so to speak, by the setting of the, by the regulations concerning the harvest of these fish?

"A. Two things; you try to correct the cause, and if you can't correct the cause, then you allow for its effect.

"MR. MCLEOD: What was the last statement?

"THE WITNESS: If you do two things in the mortality problems, you try to correct the cause.

"MR. MCLEOD: Yes, but what was that last statement that you made?

"THE WITNESS: If you can't correct the cause, then you must allow for its effect.

"Q. Now, directing your attention to the Commencement Bay area, and the Puyallup River, I believe there has been testimony that there is an area that is closed to commercial fishing; what about sports fishing for salmon?

"A. Sports fishing is allowed in the bay.

"One thing that has become quite well known with the sports fishery, and that is, especially after the fish have finished their migration through the sound and they are milling near the river mouth and maturing, they cease feeding and they don't strike very well, so the hook and line fishery will take but a small percentage of the available stock

no matter how hard they fish.

"And the river itself, we had a sports fishery on the river in past years, limited in area, and then further limited in time, and then as our dissatisfaction with spawning escapements increased, at our last regulation hearing we closed the Puyallup River to all sports fishery for salmon, except for what we call "jacks". And the jacks are the precocious males that contribute very little to the spawning ground. There are no female jacks, and they can be differentiated by size since they are much longer than the other fish.

"Q. Perhaps you should explain at this point, what is a jack salmon, and whether it is a two-year fish, three-year fish, or what?

"A. It depends on the specie. "Jack" can refer to any specie. It is a salmon that matures a year prior to normal. For instance, fall Chinook normally mature as two, three and four-year old fish. The jacks mature as two-year-old fish, and they are almost 100 per cent males. So they are small males because they are younger.

"A silver salmon matures almost entirely at three years of age. Jack silvers are two years of age. And these jack silvers are usually around, oh, twelve to eighteen inches long, maximum weight

probably four and a half pounds, where the three-year-old fish largely run from five to twenty pounds.

LASATER, Direct by Coniff

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(R.S. 809)

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"Q. All right, what is the next fishery that they will encounter, that a returning migrant will encounter?

"A. Enter Strait of Juan de Fuca on the south side, and then on through Puget Sound, starting at Discovery Bay.

"Q. All right, Discovery Bay to where?

"A. There is a continuous fishery through to, under State regulations, Brown's Point at the mouth of Commencement Bay, continuous fishing water where chums are available.

"Q. Would it be accurate then to say Discovery Bay to Brown's Point, continuous fishing water?

"A. Yes. There are poorer and better grounds all the way, but the fishery is continuous, in—

"Q. Now, what—

"A. I was just going to add, in area.

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(R.S. 815)

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"Q. So, based upon that, for the fishing which takes place nearer to Discovery Bay than to Brown's Point, is there any way of establishing how many of the fish which are taken out at that point would have gone to the Puyallup River rather than to, oh, the Deschutes, or some other river which empties into the sound?

"A. In some cases and to some degree, yes.

"Q. Well, in what cases and to what degree?

"A. Oh, there has been tagging, for instance, in the outer Strait, and from this we can have an idea

of the exploitation rates on the Puyallup stock, their timing through the fishery, the effectiveness of the fishery on them at various points.

"Q. So can you then establish a rough working hypothesis as to the effect of the fishing or the fishery near Discovery Bay up on the Puyallup run itself?

"A. I would say yes.

LASATER, Cross

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(R.S. 832)

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"Q. Now, this would raise at least the possibility, would it not, sir, that there was a factor outside the Puyallup watershed itself which contributed to, or caused that decline?

"A. We are confusing brood years here. 1960 was the very bad year. 1963 was the result of progeny from a very poor over-all decline in 1960.

"The run is up considerably by brood year 1963 over the parent stock. You see, you are comparing one parent stock with another.

LASATER, Cross

(R.S. 833)

"Q. (By Mr. Cone) Well, all right, the sentence that I read is actually a comparison of one year?

"A. One year.

"Q. One calendar year with the next previous?

"A. (Nods head) We apparently had a poor brood year in 1960.

"Q. There appears, or does that appear—do you know whether that was an across-the-board low year?

"A. It was.

"Q. Well, would that low year in 1960, and the fact this was an across-the-board low year, would that raise in your mind the possibility of the existence of a factor outside of the Puyallup River watershed itself?

"A. Yes, it does. We had to put in emergency closures that year to get a sufficient spawning stock on the grounds.

"Q. Well, and the run was very poor that year, wasn't it?

"A. The run was poor in 1960.

"Q. It was poor on silver salmon across the board, wasn't it?

"A. Yes.

"Q. Well, the poorness of that run, the fact that it was poor across the board, would raise in your mind, would it not, sir, the possibility or probability of a mortality factor which existed just outside the Puyallup River watershed?

"A. Yes.

LASATER, Cross

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(R.S. 849)

"Q. Could you give me an approximation as to whether, as to how the catch by the sport fishery of, I think the word you used was 'resident'?

"A. Yes.

"Q. (Continuing)—silver salmon in the salt water phase, and in Puget Sound, compares with the catch taken by the Indian net fishery on the Puyallup River?

"A. I believe there are some figures, if I may refer to that.

"Q. If you would, please.

"A. I am sorry, but it isn't split by resident and ocean fish migrating through here. I think that material would be back in the office.

"Q. I see.

"A. This is the total Puget Sound silver catch, and I wasn't thinking—it is not split as to whether the fish are resident or otherwise.

"Q. Would this be the total sport catch that you are referring to now?

"A. Of silver salmon.

"Q. I take it you are referring to the 1963 figure; is that correct?

"A. I have it from 1949 through 1963, sport catches of silver salmon, Puget Sound.

"Q. Would you give us the 1963 figure as opposed to the silver salmon catch by the—would you give us that, and then give us the Puyallup River net fishery catch for that year also for silvers?

"A. Of course, the Puget Sound catch comes from all

LASATER, Cross

(R.S. 850)

Puget Sound streams, and the Puyallup catch here is strictly from one river. 1963, Puyallup Indian catch of silver salmon, 13,461.

"1963 catch of silver salmon in the sport fishery, from the total of the Puget Sound, 120,900.

"Q. Now, would there be any way—I realize that perhaps you don't have the date with you today, but would there be any way of determining approximations of the proportion of the sport catch in the Puget Sound which would have been Puyallup River spawning fish?

"A. I believe it could be, an approximation could be calculated.

"Q. And I take it this was a portion of the data which you indicated yesterday which had not been finally—it was available, or it would take a great deal of computation to put it into final form; is that correct?

"A. There is a lot of data that would have to be put together in a particular way, and the proper statistical mathematics applied to make such an approximation.

LASATER, Cross

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(R.S. 855)

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"A. Yes, an approximation.

"Q. Highest allowable mortality.

"So as a completely hypothetical approximation we could say that for instance if we increase—if we add into the total picture we are talking about, say, a two per cent mortality from sports fishing, then in order to preserve this run, that

two per cent has got to come out in the form of a diminishment of some other mortality factor, or you are going to lose the entire run—am I correct in that?

"A. Yes.

LASATER, Cross

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(R.S. 861)

"Q. And, the Chinook, with the Chinook would you say once more that there should be no mortality factor allowable at all from Commencement Bay upstream except for a sport fishery?

"A. Yes. The reason I hesitate, I am thinking of the type of gear and fishery that I know about in this area, and the milling pattern of the fish, and how they behave.

"Q. And in what way would that affect the—

"A. Well, see, we have a sport fishery there.

"Q. You have a sport fishery in Commencement Bay, is that correct?

"A. That is right.

"Q. Do you have any sport fishery upstream on the Puyallup for Chinook?

"A. Not now. We closed it.

"Q. And with the Chinooks, would your answer be the same as it had been with the silvers and the pinks, that the proportion of the Puyallup River run taken by sport fishery or by commercial fishery, as opposed to the Indian net catch is something that you believe is calculated but you are not in possession of that data at this time?

"A. That is true.

"Q. Would it be accurate to say then that in your regulation you have not found it necessary to work with any comparison of the proportion of the run which is taken by Puget Sound commercial fishermen as opposed to the Indian net fishery on the Puyallup River?

LASATER, Cross

(R.S. 862)

"A. For the particular river, no.

"Q. And, sir, would I be accurate in saying that this is because you have determined from a conservation standpoint that the 99 per cent mortality must or should occur prior to entry into this Indian fishery?

"A. Yes.

LASATER, Cross

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(R.S. 865)

By Mr. Coné:

"Q. All right. But dealing with the stretch of water which I have just indicated, to wit, Commencement Bay and so much of the Puyallup River as extends upstream to the town of Puyallup, would it be accurate to state that regulation of fishing in that area, from your standpoint as a conservationist, essentially means a prohibition of all non-sport fishing for the four types of salmon which we have just discussed?

"A. Yes, that is correct.

"Q. We have discussed, sir, with each fish, a series of mortality factors.

"Now, as a, just as a starting point, would it be correct to say that there are some of these mortality factors which can be regulated by your department, and there are some which are beyond regulation?

"A. That is correct.

"Q. All right. Now, would you indicate for us the mortality factors that we have discussed, those which are subject to regulation by your Department?

"And by 'regulation,' I don't mean, in a technical sense, that you pass laws; I mean within your power to—

"A. To control?

"Q. —to control?

"A. To some extent, at least.

LASATER, Cross

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(R.S. 1062)

JAMES ARTHUR HAMILTON TESTIMONY
(R.S. P. 1062, 1063, 1071)

• • •

"A. Theoretically, yes. There are many cases where it can be done, because there's overlapping of runs coming through at the same time. Voight Creek, Kelly Creek, Clear Creek, any Cohoe or Silvers coming through at the same time, it would have to be considered as a unit because you can't separate them.

"Q. Now, going back to your hypothetical, if we have ten thousand fish, and we need a 1,000 fish escapement—

"A. Yes.

"Q. (Continuing)—you are not telling us, are you, sir, in this particular situation, our actual situation here, that from the conservation standpoint it is necessary that all 9,000, which we are going to alllow to be caught, be caught by any particular person at any parrticular place?

"A. No.

"Q. So, would it be correct to say, then, the allocation of that nine thousand, the proper nine thousand harvest, to a particular group of people at a particular place is essentially a non-conservation matter?

"A. That is, I have always considered a social affair, if I can put it that way, if you grasp what I mean

HAMILTON, Cross

(R.S. 1063)

by a social affair, or a political affair.

"Q. I certainly do.

"A. As the Fraser River, the allocation of the Fraser River catch was not a problem of the fishery

biologists or the research team that was set up by treaty to study the thing, it was already given to them, and that was determined, I am sure, politically and determined sociologically, you might say.

HAMILTON, Cross

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(R.S. 1071)

"Q. In other words, you might theoretically at least with our watershed provide for an escapement of theoretically 1,000 fish, but rather than balancing it out among the various spawning grounds, you might end up with 1,000 fish which go to the Puyallup and Voight's Creek and Carbon River fishing ground and no fish which are left to go to the White River spawning ground, is that correct?

"A. If they are migrating at the same time, I don't think that would be necessarily correct, but if there were distinct entrance times, I think probably so.

"Q. So going back to my harvesting analogy, if I were to alter it and say that if you left the milling area untouched, the area in which they mill, but moved your fishery to the mouth of the river, where they break off and start coming up the river, that from a pure harvesting standpoint it would be correct to say then that given the state of the art in which we cannot identify with precision the races of the fish when they are out in Puget Sound that the optimum place to harvest would be in the mouth of the river?

"A. Providing, of course, that it was strictly regulated, I am inclined to think that would be true.

"Q. Thank you.

"MR. CONE: I don't believe I have any further questions, Doctor.

HAMILTON, Cross

(R.S. 1120)

MR. MILLENBACH'S TESTIMONY (R.S. 1120)

"A. Yes, subject to checking on the part of our game law enforcement officers.

"Q. And they are subject to the individual reliability of each fisherman to accurately state the extent of the catch, isn't that right?

"A. They are the ones that record on the punch card the data, and I think this is correct.

"Q. It is sort of an honor system?

"A. Yes.

"Q. Is that correct?

"A. With checks, if you will.

"Q. Now, the '55-'56 season you indicate in the Puyallup River the sportsmen took 18,496 fish, is that correct?

"A. Yes.

"Q. And the Indians took 1,200?

"A. But this is the extent of the information we have on the Indian catch.

"Q. Yes. Then in 1952, the Indians took 104 and the sportsmen took 14,190?

"A. This is to the best of our records, yes.

"MR. MCLEOD: Your Honor, I would like to renew at this time my motion to strike on the grounds previously state concerning this witness's testimony.

"THE COURT: The motion will be noted; the same will be denied.

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(R.S. 1268)

DR. TAYLOR'S TESTIMONY (R.S. 1268)

* * *

"A. Before the coming of the horse—and I am sorry to have to keep referring to the coming of the horse, because there was no time than this at which the horse got so influential and had as serious an effect on the way of life of the majority that would

have occurred later, but it was interpreted that the first affairs of the white man and the virtual destruction of the Indian population by disease occurred before the introduction of the horse. The ecological adjustment was almost entirely marine and river oriented.

"As we go back in time, or if you go back a thousand years in the anthropological cycles, you can see heavy land mammal hunting. Some of this continued in the Puyallup in common with the other sources of personal kill. They killed some deer, they killed some bear, but overwhelmingly they have been dependent on the sea and the river.

"The single most important food item, based upon the anthropological records, was not fish but clams.

"The second most important, and a very important second item, was fish, primarily salmon, but many other fish as well.

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(R.S. 1283)

DR. TAYLOR'S TESTIMONY
(R.S. 1283, 1284)

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"Q. Now, Doctor, returning again to this term "usual and accustomed grounds," do you have any—can you give us your impressions, based on your research in this area of how or what meaning or significance this term would have to the Indians, or for that matter, on the part of the federal representatives or negotiators who were charged with the responsibility of framing the Treaty of Medicine Creek?

"A. Prior to the coming of the white man, sir, each tribe understood pretty well what its major fishing

TAYLOR, Direct

(R.S. 1284)

and clamming grounds were. It was a very rare thing that violence occurred that would be intratribal or even intravillage.

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(R.S. 1288)

DR. TAYLOR'S TESTIMONY
(R.S. 1288)

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"A. I can give you a general description that I had in mind.

"Q. If you would, please do so, Doctor.

"A. A wide variety of fishing techniques were employed. Upriver systems, the fish will be speared. Fish weirs would be built, and fish traps would be built.

TAYLOR, Direct

(R.S. 1509)

DR. TAYLOR'S TESTIMONY
(R.S. 1509, 1510)

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"Q. Going back to the pre-treaty time, and I hope to wrap this up rapidly, would it be true to say the people of the Puyallup River habitually—strike the word habitually—have fished at night?

"A. They fished at night.

"Q. They used to fish at night, didn't they, because, to make the tackle fish easier?

"A. There is trouble with the word "often" but it was not unusual.

"Q. All right. They fished, am I correct, with spears?

"A. Yes, sir.

"Q. They fished with nets?

TAYLOR, Cross

(R.S. 1510)

"A. Yes, sir.

"Q. Did they fish with artificial platforms or barriers embedded, which impeded the migration of the salmon where they would scoop them out of the water?

"A. Yes, although in the larger streams they could not completely block the stream, and in smaller streams they would put barriers that for periods would completely block it.

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(R.S. 1320)

DR. TAYLOR'S TESTIMONY
(R.S. 1320, 1321)

* * *

"A. I have two additional things that—

"Q. Please go ahead, sir.

"A. — I would like to make.

"The minutes also contain the following comments: (Pause.) At the moment I can't find them in here, but I am quoting directly from those notes of mine.

"It was also thought necessary to allow them to fish at all accustomed places, since this could not interfere in any manner with the rights of citizens, and was necessary for the Indians to obtain subtenance.

"Q. And you had indicated, I believe, sir, that there were third party comments or—

"A. Yes, sir. I should say that there is a third comment which is contained in the Treaty itself. There is a clause in the Treaty which says that they will be allowed to fish at all of their accustomed fishing places, in common with the other citizens of the Territory.

"Q. Now, do we know, sir, whether or not the, in the

TAYLOR, Cross

(R.S. 1321)

proposals, the actual oral proposals made by Governor Stevens during the treaty rounds, whether or not in his English proposals, that is, the proposals in this English language he used the phrase which appears in the treaty, which was actually ratified, 'in common with the other citizens of the territory?'

"A. We don't know. My best guess, if you wish a guess, is that he told them that they would be allowed to continue fishing where they had fished before.

"Q. Are we able, historically, based upon your knowledge or studies, to account for the differences between the actual Medicine Creek Treaty and the

draft to which I initially referred you here, which used the phrase, 'all common and accustomed places,' I believe?

"Let me be accurate on that.

(Brief pause.)

"Fishing at all common and accustomed places, and further secure to them . . .' and it makes no mention of 'in common with the other citizens of the Territory.'

"Can we account for this change?

"A. Well, in the first place, there is a, we have these missing minutes. We don't know how long the minutes were missing. We have Meeker's word for it that when, what he wrote in 1905, he writes about the minutes, and he quotes the letter, and this is a sense a reply, in his book, that he was told that, 'Unlike all of the other treaties conducted by

TAYLOR, Cross

(R.S. 1347)

TESTIMONY OF DR. TAYLOR
(R.S. 1347, 1348)

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"Q. At the time of the treaty in 1854, and you went up on the Puget Sound area here, was this, insofar as you know, were there commercial fishing vessels operating in the Sound?

"A. Not as far as I know. There are some interesting discussions on it. For instance, there is a reference to state land for shellfish which implies that commerciality had begun to appear. But if it were present it must have been present in an infantile form. And the very remark that, of course they should be allowed to fish at their accustomed fishing places, because it would not interefere with the rights of the other citizens, and this indicates that no one had any perception of the enormous commercial importance of the fish.

"Q. Do your resources or studies, sir, indicate to you whether or not the Puyallup Indians took fish solely for their own food?

"A. Yes, it does indicate that they did not take them solely for their own food.

"Q. What, other than needing the fish for themselves, did they do with them?

"A. They smoked—

"Q. Other than eating fish themselves?

"A. They would gather fish and certain other marine

TAYLOR, Cross

(R.S. 1348)

produce, which were clams primarily, and the clams were more important because they smoked clams. They smoked salmon also, very strongly, and then traded them down to the Columbia, on the *Baitish* on the Cowlitz. Or they would take them over the mountain trails directly into the interior in turn for a number of commodities that they couldn't readily get themselves.

"Flint being before the coming of the white man, and that was one of the commodities, that trade seems to have died off rather rapidly after the coming of the Hudson Bay Company because of, of course, iron, steel, gunpowder, which became much more important commodities than flint.

"Q. What, if you know, did the Puyallup Indian Tribe trade with Hudson Bay?

"A. Pardon me. I was about to add that they also sold clams and salmon to the Hudson's Bay Company,

although this was relatively minor, but it was a part of the Hudson's Bay trade.

"Q. Thank you.

"A. I was going to add that the Hudson's Bay Company bought salmon and clams for shipment elsewhere within their own company, and this was for shipment elsewhere in the Northwest Coast area wherever they had a trade facility.

"Q. But for consumption?

"A. (Nods head affirmatively.)

TAYLOR, Cross

* * *

(R.S. 1513)

"Q. What about Commencement Bay?

"If I were a Village 5 Puyallup, could I feel reasonably confident that I would be able to go downstream and fish in Commencement Bay?

"A. If you were at Village 5 you would be living in Commencement Bay.

"Q. The entire portion?

"A. (No response.)

"Q. Could I not fish clear out to Brown's Point and Point Defiance if I so chose?

"A. Yes, sir.

"Q. What about across the bay on Vashon at the area as Neal Point, could I fish there if I wanted?

"A. There is dispute on that, among ethnologists. Certainly Marian Smith thinks so. Certainly others think this was, at least at times, *twana noquales.*

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(R.S. 1467)

TESTIMONY OF HATTIE CROSS
(R.S. 1467, 1479)

"DIRECT EXAMINATION

By Mr. Knodel:

"Q. Would you state to the Court your name and address, please?

"A. Hattie Cross.

"THE CLERK: Hattie Cross?

"Hattie Cross

HATTIE CROSS, Direct—by Knodel

(R.S. 1468)

"THE WITNESS: Hattie Cross.

"THE CLERK: How do you spell that first name?

"THE WITNESS: H-a-t-t-i-e.

"Q. (By Mr. Knodel:) And what is your address, Mrs. Cross?

"A. Route 6, Box 728, Puyallup.

"Q. And Mrs. Cross, when were you born?

"A. Oh, 1893, September the 2nd.

"Q. Now, you were not born on the Puyallup Reservation?
"A. No, I was born in the Hoods Canal.
"Q. Hoods Canal?
"A. (Nods head affirmatively.)
"Q. And when did you first come to the Puyallup area?
"A. In 1904 I came to the Puyallup Indian school.
"Q. You referred to the 'Puyallup Indian school.' Was there any limitation as to children that could enter that school?
"A. I didn't quite understand.
"Q. Was it limited as to who could go to that particular school?
"A. No, there wasn't. All the children from all reservations went to that school.
"Q. Is it fair to say that you had to be of Indian nationality?
"A. Yes.
"Q. You attended that school how long?
"A. Until 1910.
"Q. And did you graduate from that school?
"A. Yes.
"Q. And after this, did you—well, at what stage did

(R.S. 1469)

marry your husband, Silas Cross?
"A. I married him in 1911.
"Q. And he is now deceased; is that correct?
"A. Yes.
"Q. Now, directing your attention to the time that your husband, Silas Cross, and you were married, what date did you say?
"A. November the 11th, 1911.
"Q. 1911?
"A. (Nods head affirmatively.)
"Q. Well, taking the time from 1911 to 1920, do you recall any activity that your husband took part in as far as the tribe, the Puyallup Indian Tribe is concerned?

"A. Yes, he did. He was mostly in sports.

"Q. What type of sports were these?

"A. Well, baseball, and—oh, we used to have a, reunions every year.

"Q. All right, let's talk about these sports; what kind of, or who made up the baseball team?

"A. The Puyallup Indian boys made up the baseball teams.

"Q. And you say you had reunions every year?

"A. We had reunions that, after they closed the school, and then all of the former students had reunions at the school grounds.

"Q. When did they close the school?

"A. Well, I think about 1918, or somewheres in there. I am not sure.

"Q. Well, how about, say the Governmental function of the Puyallup tribe, do you recall your husband taking an active part in that?

HATTIE CROSS, Direct—by Knodel

(R.S. 1470)

"A. Not until the later years.

"Q. Well, what years would you place this at?

"A. Oh, about 1927, from there on.

"Q. Do you recall, during your time in 1910, 1911 and directing your attention to the years from 1911 to, say, 1920, whether there was anybody or group of individuals that would govern the Puyallup tribe?

"A. Yes, there were. Oh, there was a committee there at all times.

"Q. Do you remember any of those committee people's name per chance?

"A. Well, Mr. Meeker, and Mr. Swadell, and Mr. Sicade. And I don't know what years they served, but then they were all on the committee at different times. Willie Jim and Whoopdy John and Joe John, Mr. Goudy, Mr. Wilton.

"Q. Now, directing your attention back to the school again, was there any type of language that was spoken in school other than English?

"A. Well, when the children get together by themselves, they talked to themselves, you know, run each other in their native tongue.

"Q. What was their native tongue?

"A. Some were Puyallup, and some were Yakima, and some were Idaho.

"Q. Did the Puyallup—

"A. Everybody has a different accent.

"Q. Well, did the Puyallups have a tongue of their own?

"A. Yes.

HATTIE CROSS, Direct—by Knodel

(R.S. 1471)

"Q. And was that spoken as late as 1910?

"A. We weren't supposed to speak it, but we did on the sly.

"Q. Why do you say you weren't supposed to speak it?

"A. Well, they wanted us to learn the English language.

"Q. Is it fair to say then that they discouraged the speaking of your native tongue?

"A. Yes.

"Q. Now, did you see any fishing activities that took place by the Puyallups, say, from 1911 on?

"A. Well, my own family did quite a bit of fishing, and everybody, all the Indians that lived on the river fished. And the other people that lived close to the creeks, like Wapato Creek, and the Hylebos Creek, and Clarks Creek, and First Creek, they all fished in the creeks. They were closer to their homes.

"Q. Now, you say they fished in their creek, how long did they continue to do this fishing?

"A. Oh, they continued until they, the game wardens came after them. I don't remember whether or not, and I don't know when that was.

"Q. And after the game warden came after them, did that terminate the fishing?

"A. Not exactly.

"Q. Well, let's put it in another manner; did it discourage daylight fishing after that?

"A. Yes, it discouraged them from fishing there. They would have to be fishing on the sly.

"Q. Now, these various fish that were, fishing methods that—well, can you tell us something, a little about

(R.S. 1472)

what type, that you can recall yourself, the type of fishing gear?

"A. Well, the only fishing that I know was gill net, gill net in the river, then, or in the sound, wherever they were fishing, they used the gill nets. But in the creeks, they used the spear, or a gaff hook, or dip net.

"Q. Did they use any other type of fishing apparatus?

"A. Not that I know of.

"Q. Do you know of any fishing traps that were used at any time?

"A. Well, my mother-in-law has a fish trap right by our house.

"Q. What creek, or which river?

"A. In the Wapato Creek.

"Q. Was this in operation regularly, or could you describe it?

"A. Well, it was there all the time. Whenever the fish were running in the creek, well that is when she had her fresh salmon.

"Q. Now, Mrs. Cross, talking about salmon, do you still put up salmon?

"A. Yes, I do.

"Q. Would you tell the Court what procedure you follow, or how do you handle the salmon?

"A. Well, first the boys bring the salmon home and then we butcher them. Then we clean them, cut the meat, take the bone out and cut the meat, then salt them over night; then the next morning, we wash them and spread them out, and we take cedar sticks and spread them all out so that they

(R.S. 1473)

will be laying flat. And then we hang them up in our smokehouse. They are supposed to hang from fifteen to twenty days before they dry.

"But in the later years, we learned how to can them. So, when they are smoked about three or four days, we bring them in the house, and put them in the jars and can them.

"Q. This smoking habit, this smoking procedure, has this been done, or how long can you recall, this being done?

"A. Well, ever since I can remember anything. My mother did it.

"Q. And is this one of your customs that you have carried over?

"A. Yes.

"Q. Let me ask you this question; do you have any salmon that you are smoking presently?

"A. Yes, the smokehouse is going right now.

"Q. Now, directing your attention to the church, was there any church that the Indians would attend?

"A. Yes, they had a church there that was down at Cushman, or the where the church is now.

"Q. What type of church was it?

"A. It was a Presbyterian church.

"Q. And do you recall, was that there when you started the school?

"A. It was there when I first came to the school, yes.

"Q. And was there any other type of church?

"A. There was a Catholic church, but it was across the river on John Coates, I think his name was. It was on John Coates' place.

HATTIE CROSS, Direct—by Knodel

(R.S. 1478)

expedite matters, as far as this witness is concerned.

"Except for the photographs, I am through with the witness.

"THE COURT All right.

"MR. CONIFF: Well, I do have one or two questions of Mrs. Cross.

"CROSS EXAMINATION

By Mr. Conniff:

"Q. Mrs. Cross, where do you reside now? I didn't get that into the record.

"A. I reside in, on my father-in-law's allotment.

"Q. I see. Whereabouts is that?

"A. It is between Firwood and Fife on the old Seattle highway.

"Q. Firwood?

"A. (Nods head affirmatively.)

"Q. Do you own that piece of property?

"A. Yes.

"Q. Could you sell it if you wanted to?

"A. Yes.

"Q. I am going to ask you if you voted in the last election?

"A. Yes.

"Q. I won't ask you who you voted for.

"A. I served on a school board for eighteen years.

"Q. I see.

"A. My husband served on the school board for fifteen years.

"Q. What school board was that?

"A. Firwood School District 99.

HATTIE CROSS, Direct—by Coniff

(R.S. 1479)

"Q. I see. Now, I take it that your interest in school boards was prompted by your children, I assume?

"A. I had a big family, yes.

"Q. I might ask how many children you have in your family.

"A. Seven.

"Q. Seven children?

"A. (Nods head affirmatively.)

"Q. And did they go to school in the Fife area?

"A. All in Firwood until the 8th grade, then they went from Fife High School, and *Chow-mowey* Indian school.

"Q. About when did your children get through high school, about what period of time?

"A. There is seven of them.

"Q. Well, that is, or I will withdraw the question.

"A. They all went through high school.

"Q. Now, I believe you testified that you and your husband were married on November 11th—

"A. 1911.

"Q. 1911?

"A. Yes.

"Q. Were you married in the church?

"A. No, we was married in the courthouse in Tacoma here.

"Q. Oh, I see.

* * *

TESTIMONY OF ATTORNEY BURKEY
(Land Title Attorney)
(R.S. 1568)

"Q. Can you recall at this time any patents, deeds, or grants which contained any reference in words or substance to a conveyance or purporting to convey any right, title or interest in the fishing?

"A. No. Not to my knowledge, no.

* * *

LETTER OF A. H. MILROY TO COMMISSIONER OF INDIAN AFFAIRS
(R.D. Ex. FF)

In continuation of my special reports upon the legal status of the Indian Reservations of this Superintendency I have the honor to submit the following as my Special report upon the legal status and boundaries of the Puyallup Reservation. This reservation belongs to the survivors of those "tribes and bands of Indians" who were parties to the Medicine Creek Treaty of December 26, 1854, but by reference to that treaty it will be seen that

it was not one of the reservations therein set apart and defined.

The three reservations set apart and defined in article 2nd of that treaty are mentioned as containing only two sections each, while the Puyallup Reservation as at present constituted contains about 36 sections. It is one of three reservations indicated and agreed upon at the Fox Island conference of August 4, 1856 as mentioned in my special report of the Muckleshoot Reservation—which see—.

A threatening and dangerous dissatisfaction among the Indian parties to the Medicine Creek Treaty, upon discovering the meager reservations assigned them by that treaty, led to said Fox Island Conference and the assignment of the Muckleshoot and the ample Nisqually and Puyallup reservations—I use the word ample in speaking of the two latter reservations, as they are ample in comparison with the two square tracts "each containing two sections of twelve hundred and eighty acres" as described in the 2nd article of said treaty and in lieu of which, or in addition to which, said two ample reservations were agreed upon for the purpose of satisfying said dissatisfied Indians and insuring peace with them.

It will be seen by the original map of the survey of the boundary of the Puyallup Reservation forwarded to your office by Gov. Stevens December 5, 1856 (a copy of which is herewith enclosed that said reservation was set apart and its exterior boundary surveyed and established prior to the extension of the lines of the public surveys over the surrounding and adjoining lands, excepting the 5th Standard parallel which had been established.

There is not on the records or among the papers of this office a copy of the proceedings of said conference at Fox Island at which the area and location of the present Puyallup Indian Reservation was agreed upon—but all of the surviving Indians who were present at said conference assure me that it was the understanding and intention of both parties to said conference to have said reservation bounded in its westerly side by the shore of Puget Sound from the extreme south-easterly extremity of Commencement Bay around northerly to the northwest corner

of the reservation on the southerly shore of Admiralty Inlet—and I think that references to the proceedings of said conference will show the proper location of this reservation with reference to the Sound and the frontage upon, with uninterrupted access to the reservation was the intention and understanding of both parties.

Please see copy of the proceedings of said conference forwarded to your office with a letter from Gov. I. I. Stevens dated August 28, 1856. Whatever may be therein stated, the fact that the Indians who were parties to said conference (Fox Island) were fish and clam eaters and draw their sustenance almost wholly from the salt waters of the Sound, proves conclusively that they never would have voluntarily consented and never did knowingly consent to the establishment of that portion of the boundary of said reservation as indicated by the nearly north and south line between Stations No. 42 and 1 of said survey—crossing the mouths of the Puyallup River and the whole easterly end of Commencement Bay, over three miles—cutting them off in that distance from access to the valuable fisheries at the mouth of the Puyallup River, to which they always previously had access, and from access to the exhaustless clam beds at low water, along the shore of the Bay nearly a mile south of the mouth of the Puyallup and for over two mile north of the marshes of that river, and leaving capes and strips of land between the reservation and the waters of the Sound upon which no account white men have taken claims and deny this free access from their reservation to the waters of the Sound tho in many places, only a few rods distant—see map.—

The great and criminal blunder or rather neglect in the survey of this boundary—for it is the patent for a blunder—was in not making Station No. 1 (See original map of said survey) on the line of low water mark at the southeastern extremity of Commencement Bay, and making said line of low water mark then southerly with the meanders of the shore and crossing the mouth of the Puyallup River to the norhtwest corner of the reservation at Station No. 13, the western boundary of the reservation. This would have made the boundary in accordance with justice and the understanding of the Indians, and

avoided all subsequent trouble about this matter.

A glance at the original map of the survey and location of the boundaries of this reservation will show the very culpable blunder from ignorance or the very rascally neglect from" of the surveyor who made said survey and location.

Starting at "a Fir tree" he seems to have blundered on, and which he makes "Station No. 1" he went zig-zagging around without regard to the points of the compass—private land claims, shape of the reservation, or anything else, except plenty of corners, courses and distances, until he arrived at Station No. 13 where common sense would have dictated a stop, and the naming of the shore line around crossing the mouths of the Puyallup River to the nearest point to his "No. 1 Fir tree"—But instead of this he went ahead zig-zagging and making corners, courses and distances around the shore of the Sound 29 Stations further (all wholly useless) till he arrived at Station No. 42. Here, having got tired—whisky gave out—or for some other reason he stopped zig-zagging and by triangulation, or otherwise, shot a straight line 234 chains and 50 links (about three miles) to the "Fir tree" as Station No. 1. A glance at the map will show that this line crossing lagoons, inlets, marshes and the mouths of the Puyallup River could not have been measured with the chain. Justice and good faith imperiously demand the correction of the great blunder of having made said line between Stations No. 1 and 42 the western boundary of the reservation instead of the lines of low water mark on the eastern shore of Commencement Bay. But as the Government has taken advantage of this blunder and surveyed and sold a portion of the lands between the line from Station No. 1 to Station No. 42 and the Bay, and as the matter has now become complicated and difficult of adjustment—therefore as a compromise with justice and to avoid disturbing land owners and vested rights as much as possible, I propose to shift to the line of low water mark on the eastern shore of Commencement Bay, so much of the western boundary of the reservation now bounded by the line between Stations No. 1 and 42 as is situated between Station No. 42 and the line of low water mark on the north shore of the south branch mouth

of the Puyallup River. And to the end that this change in the boundary may be permanently fixed and legalized, I respectfully ask an Executive Order defining and fixing the boundaries of said reservation as follows towit:

Beginning at the line of low water mark on the northern shore of the south branch mouth of the Puyallup River at a point where there same is intersected by the present boundary line of the reservation—then south with said boundary line to Station No. 1 as the same is indicated and marked on the original survey of said reservation—thence on to the different other stations in the order made and indicated by said survey with the courses and distances between the same to Station No. 13 of said survey—thence on the same course to a point where the same intersects the line of low water mark on the southerly shore of Admiralty Inlet—thence with the line of low water mark westerly and southerly along the shore of Admiralty Inlet and Commencement Bay with all the meanderings thereof to a point northeast of the north western extremity of the island between the north and south branch mouths of the Puyallup River — thence across the northern branch mouth of the Puyallup River to the line of low water mark on said northwestern extremity of said island—thence southerly and easterly with the line of low water mark around the shore of said island to the place of beginning—

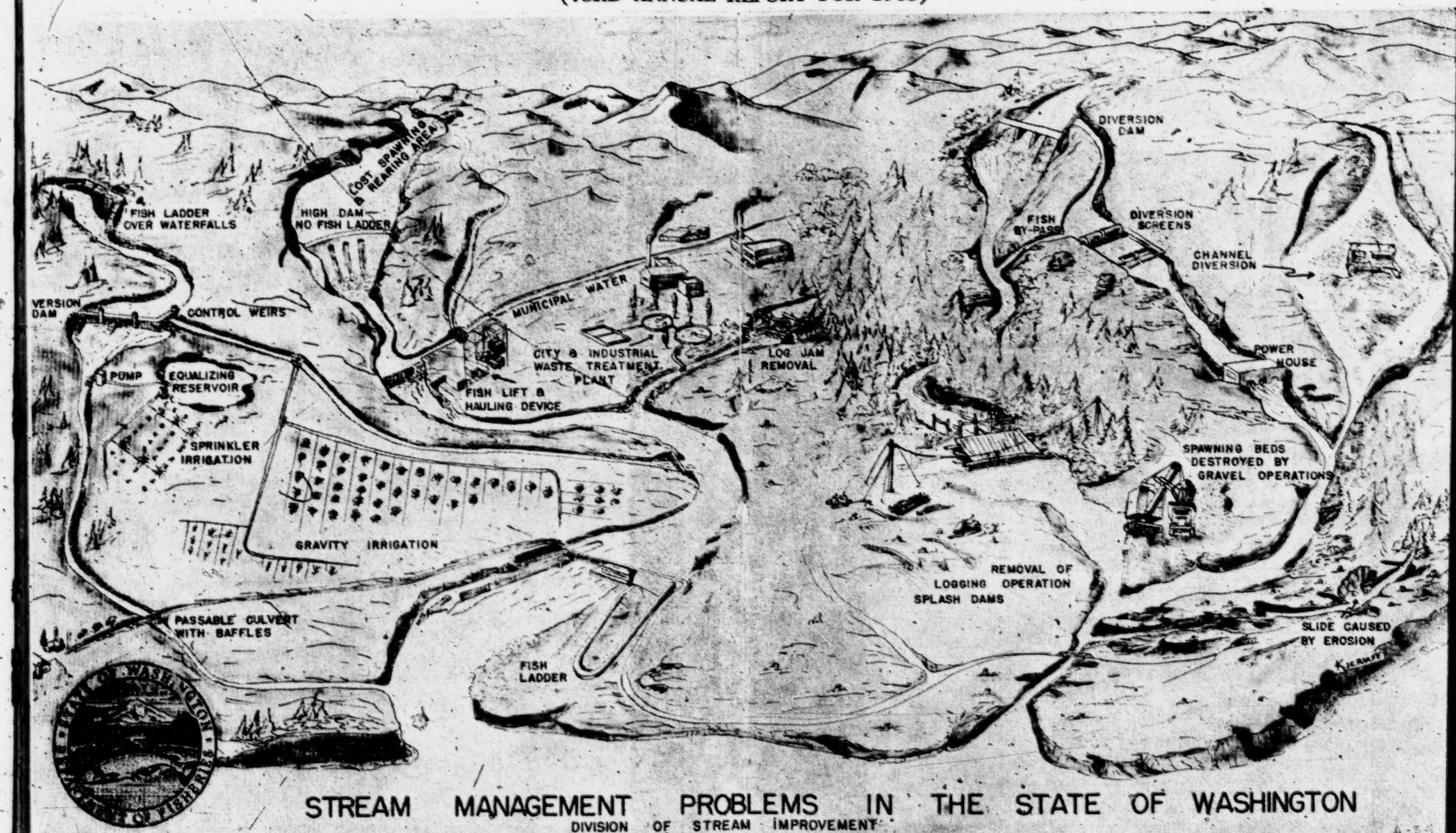
In view of the fact that his matter has been several times heretofore brought to the attention of the Department by my predecessor and has long been a source of trouble and complaint on the part of the Indians of said reservation, and of the further fact that the terminus of the N.P.R.R. will most probably be soon located in the vicinity of this reservation which will cause a rapid increase of settlers and much augment the trouble growing out of this unsettled matter, and in view of this still further fact that the basis of value fixed by the commission headed by Gov. I. I. Stevens "to hold treaties with the Indian tribes in Washington Territory" to be paid to the Indians per capita for all lands ceded by them was $10 for each chief—$7.50 for each sub-chief and $5 to all other persons (see record of proceedings of said Commission and the Indian parties to the Medicine Creek

Treaty were treated with on this basis and the number fixed at 638 which gave them only $32,500 for the vast and valuable country by them ceded, when in truth and in fact there were about 1,400 of them and they ought to have had at least $75,000, said treaty thus being a fraud and a swindle upon said Indians—See report Comm. Indian Affairs of 1859 pp. 391 and 394—In view then of these facts and of the fact that our Gov. claims to be just and to do equity, I respectfully ask and urge as a small modicum of justice due these Indians that the boundaries of the Puyallup Reservation shall without delay be made to conform in part to the intention of the parties who authorized it as indicated.

All of which is respectfully submitted.

Signed/A. H. MILROY
Supt. Ind. Affairs
Washington Territory

WASHINGTON STATE DEPARTMENT OF FISHERIES
R. E. EX. 32, PAGES 48, 49
(73RD ANNUAL REPORT FOR 1963)



WASHINGTON STATE DEPARTMENT OF FISHERIES
(73rd Annual Report for 1963)
(R.P. Ex. 32, Page 127)

* * *

Puget Sound Salmon

The highlight of the 1963 salmon fishery was the exceptional run of pink salmon to the Skagit, Dungeness and several other Puget Sound streams. The total catch of this species by net fishermen was 5,671,718 pink salmon while coastal trollers took 629,988 for a total of 6,301,706 fish. Breaking this down by gear; purse seines took 3,940,078 fish (62.5%), gill nets 1,094,957 fish. (17.4%), trollers a record high of 629,988 fish (10.0%), reef nets 90,439 fish (1.4%), and miscellaneous Indian gears other than those fishing in common with the non-Indian fleet, 546,244 (8.7%).

* * *

H. G. MAISON, Individually and as Superintendent, Dept. of State Police of the State of Oregon, *et al.*,
Appellants,

v.

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION, *et al.*, *Appellees*.

No. 17139

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT
Feb. 15, 1963.

Robert Y. Thornton, Atty. Gen. of Oregon, Arthur G. Higgs and Roy C. Atchison, Asst. Attys. Gen., Salem, Or., for appellant.

Frank E. Nash, Mark C. McClanahan, King, Miller, Anderson, Nash & Yerke, Portland, Or., for appellees.

Before HAMLIN, Merrill and KOELSCH, Circuit Judges.

KOELSCH, Circuit Judge.

This case involves fishing rights of the Confederated Tribes of the Walla Walla, Cayuse and Umatilla Indians under a treaty with the United States.

[1] The District Court had jurisdiction under the provisions of 28 U.S.C.§1131, relating to federal questions, and 28 U.S.C. §2201, the Federal Declaratory Judgments Act. The provisions of 28 U.S.C. §2281, requiring a three-judge court are not applicable and trial was properly had before a single judge.[1] Jurisdiction is conferred upon this court under the provisions of 28 U.S.C. §1291.

It appears that late in May of 1855 a joint council was held at Camp Stevens in the Walla Walla Valley of the State of Washington between representatives of the United States and certain Indian tribes of Washington and Oregon. At that council the plaintiffs' ancestors were persuaded to accept a treaty containing the following provision:

> "*Provided, also,* That the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians, and at all other usual and accustomed stations in common with citizens of the United States, and of erecting suitable buildings for curing the same; the privilege of hunting, gathering roots and berries and pasturing their stock on unclaimed lands in common with citizens, is also secured to them."[2]

The controversy here concerns that portion of the treaty provision which relates to the Indians' right to fish outside their reservation "in common with citizens of the United States."

In 1958 the Oregon State Game Commission promulgated regulations prohibiting fishing on tributaries of the Columbia and Snake Rivers during part of the year. Shortly thereafter, the Commission caused three Indians

1. 28 U.S.C. §2281 provides that where an injunction is sought restraining the enforcement or execution of a state statute or an order of an administrative agency acting thereunder, upon the ground of the unconstitutionality of such statute, the matter must be determined by a district court composed of three judges. But that provision has no application to this litigation, for the issue is not whether a statute of the State of Oregon or a regulation of its Game Commission is unconstitutional; rather, the issue is whether statutes and regulations, admittedly valid, can be applied to these plaintiffs. See *Phillips v. United States,* 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941).

2. Treaty with the Walla Walla, Cayuses, and Umatilla Tribes and Bands of Indians, June 9, 1855, Art. I, 12 Stat. 945.

to be arrested for fishing during the closed season in certain Blue Mountain streams that run into the Columbia. It further threatened to have arrested any members of the Confederated Tribes who fished contrary to the laws and regulations of Oregon.

Contending that the state's restriction of their fishing activities was contrary to the rights guaranteed them by treaty, the Confederated Tribes and several of its tribesmen sought a declaratory judgment and injunction. The court's judgment was generally favorable to the Indians:

> "Ordered, Adjudged, and Decreed that the Confederated Tribes of the Umatilla Indian Reservation and the members thereof have a right, privilege, and immunity afforded them under the Treaty of June 9, 1855, between said Tribes and the United States of America, to catch salmon and steelhead for subsistence purposes at all usual and accustomed stations on tributaries of the Columbia and Snake Rivers in Oregon, including the John Day, Walla Walla, Grande Ronde, and Imnaha River systems, without restriction or control under the game laws of the State of Oregon or regulations issued pursuant thereto."

Although the court declined to issue an injunction, it retained jurisdiction to grant such relief. The defendants have appealed.[3]

The extent of Indian fishing rights under a treaty between the United States and the Yakima Indians was in issue in *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). The court observed that prior to the treaty the Indians had unlimited fishing rights:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed." 198 U.S. at 381, 25 S.Ct. 664.

Explaining the effect of the treaty upon these rights, the court continued:

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3. The trial court's opinion is reported at D.C., 186 F. Supp. 519.

"New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them —*a reservation of those not granted.*" (Emphasis added.) *Ibid.*

The treaty involved in the instant case is substantially similar to the Yakimas' treaty and was negotiated at the same common council. Thus, the Supreme Court's analysis applies equally here. We hold that the plaintiffs' treaty reserves to them those unimpeded fishing rights which their ancestors had long enjoyed before the treaty, subject only to the qualifications contained within that document. But, the question remains, what are those qualifications?

One of them was pointed out in the *Winans* case. There it was stated that, because of the provision that the Indians were to fish "in common with citizens," the Indians had not retained an exclusive right to fish at their usual and accustomed stations. Citizens might share it.[4] *United States v. Winans, supra* at 381.

Another of the qualifications was explained in *Tulee v. Washington*, 315 U.S. 681, 62 S.Ct. 862, 86 L.Ed. 1115 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). In the former case it appears that one Tulee, an Indian, was convicted of catching salmon without a license required by a statute of the State of Washington. Tulee claimed the protection of the same treaty that was involved in the *Winans* case, arguing that it gave him a right to fish without restriction "at all usual and accustomed places" within the ceded area. The State countered with the argument that because of the phrase "in common with citizens" the appellant's rights were no greater than those of other citizens. The court did not wholly approve either contention, but said:

"We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state with power to impose on In-

4. Of course, this does not mean that a state cannot, by reasonable laws and regulations, exclude from fishing those of its citizens who are not parties to the treaty.

dians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation *as are necessary for the conservation of fish*, it forecloses the state from charging the Indians a fee of the kind in question here." (Emphasis added.) *Tulee v. Washington*, *supra*, 315 U.S. at 684, 62 S.Ct. at 864.

We applied the doctrine of the *Tulee* case in Makah. In that case the State of Washington had, by regulation, prohibited the catching of fish in the Hoko River except with a certain type of gear. As justification for the application of its regulation to the Indians, the State argued that the provision in the Makah Indians' treaty granting to them the right to fish "in common with all citizens" meant that the rights of the Indians were the same, and no greater, than those possessed by other citizens. However, rejecting that argument, we said: "The Supreme Court held in the *Tulee* case that where a treaty guarantees certain fishing rights to Indians and a state regulation impairs this right, the state must prove that its regulation is 'necessary' ° ° °." *Makah Indian Tribe v. Schoettler*, *supra*, 192 F.2d at 226.

Thus, in both the *Tulee* and *Makah* cases it was held that the Indians' right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is "indispensable" to the accomplishment of the needed limitation.

Before discussing whether the defendants have sustained their burden of proof it will be helpful to briefly explain the life cycle of the salmon and steelhead fish. Such fish are anadromous; that is to say, they are born in fresh water streams, migrate to and live the greater part of their lives in the ocean and, just before dying, return to the place of their birth to spawn. The fish born in a particular stream are delicately adjusted to its peculiar characteristics and instinctively return to it at the time of the year when successful spawning can occur. Attempts at stocking barren streams have been costly and only sporadically successful, and severe decimation

of a run of fish in a particular stream can result in the permanent destruction of its population. In traveling upstream to spawn many debilitating hardships are encountered, including natural predators, disease and water polution. By the time they reach the spawning ground, the body oils of the fish are practically used up and they are often cut, bruised, diseased, and afflicted with fungus growths.

Defendants contend that "conservation through wise use, the keynote of modern fisheries management," dictates that the plaintiffs' fishing on the spawning grounds be restricted because the value of the fish there is highest as seed stock but lowest as food. In support of that contention they cite the testimony of three expert witnesses; namely, Robert N. Thompson, a fishery biologist of the Fish Commission of Oregon, Richard T. Pressey, Supervisor of Research for the Department of Fisheries of the State of Washington, and Dr. H. John Rayner, Chief of the Wildlife Research Division of the Oregon State Game Commission..

Thompson's testimony, to the effect that unrestricted fishing of sufficient industry could exhaust the spawning beds, is a proposition about which there can be no quarrel. However, he did not relate that proposition to the facts of this case, but, on the contrary, testified that the plaintiffs have never shown a disposition to fish with marked intensity.

Pressey testified that commercial fishing by Indians on spawning grounds in the State of Washington had seriously reduced some runs; further, that the taking of fish by the plaintiffs for their own subsistence would have a similar, although not as serious, effect. However, the trial court was not bound to accept this testimony. It was largely based upon the reports of an interested party; furthermore, the witness acknowledged that the number of fish had been increasing in the Blue Mountain streams in recent years and that, in the absence of depletion, there would be no need for regulation.

Dr. Rayner testified that the taking of fish from the spawning grounds creates an "unhealthy situation," that it is inconsistent with "efficient conservation methods," that "indiscriminate" fishing endangers the fish life of

stream, and that fish "must be protected" in their spawning beds. These statements are ambiguous and vague, but even if they reflected an opinion of the witness that restriction of plaintiffs' fishing was necessary for conservation, nevertheless, that opinion was not binding on the trial court.

In Dr. Rayner's view, "conservation" is a term which involves a compromise of the competing interests of the many groups of society that desire or need fish. Such a definition is reasonable. However, Dr. Rayner further explained that, by "conservation," the Oregon Game Commission seeks to protect only commercial and sports fishermen, having no regard for the welfare of Indians. If, as it is reasonable to believe, Dr. Rayner used the word "conservation" in the sense that it was used by his employer, the Oregon Game Commission, when he testified to the necessity for conservation, he really meant, "I believe that the regulations are necessary to conserve fish for commercial and sports fishermen, disregarding the needs of the Indians altogether."

[2] Such a statement is not evidence of that "necessity for conservation" required by the *Tulee* case. In that case the Supreme Court held that a regulation, to be necessary, must be "indispensable" to the effectiveness of a state conservation program. It follows that restriction of the fishing of Indians is justifiable only if necessary conservation cannot be accomplished by a restriction of the fishing of others. Dr. Rayner, in testifying that a limitation of plaintiffs' fishing was necessary, not only ignored that requirement, but based his opinion on the contrary premise that the taking of fish by Indians can validly be restricted to satisfy the needs of the rest of society.

[3, 4] But even if the trial judge disregarded the many dificiencies and contradictions in the experts' testimony and attributed to that testimony some probative value on the issue of necessity, nevertheless, his decision that the defendants failed to sustain their burden of proof on that issue must be upheld. The trier of fact is not bound to adopt the conclusion of experts where it is contrary to his best judgment. *United States v. Hill*, 62 F.2d 1022 (8th Cir. 1933); *Tracy v. Commissioner*, 53 F.2d 575 (6th Cir. 1931), cert. denied, 287 U.S. 632,

53 S.Ct. 83, 77 L.Ed. 548 (1932). The trial judge could justifiably doubt the validity of the experts' conslusions in view of the other evidence that the number of fish taken by the plaintiffs is only a small percentage of the total salmon and steelhead harvest; that the plaintiffs have never, in over a century, destroyed a salmon run in the Blue Mountain streams or so depleted a run that destruction was threatened; and that, not only has the number of fish in these streams been increasing in recent years, the population of the Confederated Tribes is small and probably is declining.[5]

Because the court found that no conservation was necessary its broadly worded judgment, applying to any laws or regulations of the State of Oregon, is proper. Of course, a substantial change in conditions may warrant the later imposition of restrictions upon plaintiffs' fishing.

In its opinion the trial court stated:

> "Although the closure of streams during portions of the year is one method of conserving the resource and may be generally fair and convenient, it cannot be permitted to curtail treaty fishing rights of Indians where there are alternative methods of attaining the same objectives."[6]

It is apparent from this that the judgment not only was grounded upon a finding that no restriction of plaintiffs' fishing was necessary, but also, upon a finding that if it was necessary, the laws and regulations specifically involved in this case could not be imposed.

But the defendants argue that none of the alternative conservation measures specfically enumerated in the trial court's findings were available. For example, one of those listed was that the defendants could achieve conservation by limiting or prohibiting the taking of fish by sportsmen on the spawning grounds, and defendants argue that to do this would violate the provisions of the treaty.

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5. In 1855 there were approximately 1500 Indians in the Confederated Tribes; at the time of the trial they numbered only about 1200.

6. *Confederated Tribes of the Umatilla Indian Reservation v. Maison*, 186 F. Supp. 519, 520-521 (D.Or.1960).

[5, 6] However, the treaty dealt only with the rights of the plaintiffs' ancestors, and did not secure rights to any other group or class. Therefore, while a restriction of the fishing activities of the plaintiffs must be *indispensable*, as required by the treaty *[Tulee v. Washington, supra]*, a restriction of the fishing activities of other citizens of a state is valid if merely *reasonable*, as required by the Fourteenth Amendment to the United States Constitution. *Thomson v. Dana*, 52 F.2d 759 (D. Ore. 1931), aff'd 285 U.S. 529, 52 S.Ct. 409, 76 L.Ed. 925 (1932). The complete exclusion of sports fishermen from the spawning grounds as an alternative does not amount to arbitrary discrimination against them, because the state possesses broader power to regulate sports fishing than it does to regulate fishing by the Indians. This one of the alternatives listed by the court being available, we need not discuss the others.

The judgment is affirmed.

Dated this ..... day of January, 1968

s/ARTHUR KNODEL,

Attorney for Petitioner

LARRY CONIFF

Attorney for Respondent